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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-~~1225~~
183

No. ~~1225~~

REYNOLDS METALS COMPANY, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	6
Reasons for Granting the Writ	10
1. The Decision Below Conflicts With the Express Terms of the Government's Pledge of Equal Treatment and Impugns the Government's Business Integrity	10
2. The Decision Below Is in Conflict With the Defense Production Act of 1950	14
3. The Decision Below Is in Conflict With Decisions of This Court and of the Court of Claims Itself on Sovereign Action	15
4. The Decision Below Is in Conflict With Decisions of This Court Interpreting the Fifth and Fourteenth Amendments to the Constitution of the United States	19
5. The Decision Below Is in Conflict With Decisions of Courts of Appeals and of the Court of Claims Itself Concerning the Accrual of a Claim	20
Conclusion	23

CITATIONS

Cases

A.R.S. Inc. v. *United States*, 157 Ct. Cl. 71 (1962)	21
Aerovias Interamericanas de Panama, S.A. v. *Board of County Commissioners*, 197 F. Supp. 230 (S.D. Fla. 1961), *rev'd on other grounds sub nom., Board of County Commissioners* v. *Aerolineas Peruanasa, S.A.*, 307 F. 2d 802 (5th Cir. 1962), *cert. denied* 371 U.S. 961 (1963)	22

Page

Air Terminal Services, Inc. v. *United States*, 165 Ct. Cl. 525, 330 F. 2d 974, *cert. denied* 379 U.S. 829 (1964) 17
Aktiebolaget Bofors v. *United States*, 139 Ct. Cl. 642, 153 F. Supp. 397 (1957) 22
California Electric Power Co. v. *United States*, 104 Ct. Cl. 289, 60 F. Supp. 344 (1945) 22
Central Bank v. *United States*, 345 U.S. 639 (1953) ... 13
Chicago, Rock Island & Pacific Railway Co. v. *United States*, 220 F. 2d 939 (7th Cir. 1955) 20, 21
Cold Metal Process Co. v. *McLouth Steel Corp.*, 170 F. 2d 369 (6th Cir. 1948) 21
Consolidated Gas Electric Light & Power Co. v. *United Railways & Electric Co.*, 76 F. 2d 535 (4th Cir. 1935) 22
D & L Construction Co. v. *United States*, 185 Ct. Cl. 736, 402 F. 2d 990 (1968) 18
Saul Freedman v. *United States*, 162 Ct. Cl. 390, 320 F. 2d 359 (1963) 18
Horowitz v. *United States*, 267 U.S. 458 (1925) 17
Jones v. *United States*, 1 Ct. Cl. 383 (1865) 17
Kaiser Aluminum & Chemical Corp. v. *United States*, 181 Ct. Cl. 902, 388 F. 2d 317 (1967) 6, 8, 12, 14
Kaiser Aluminum & Chemical Corp. v. *United States*, 187 Ct. Cl. 443, 409 F. 2d 238 (1969) 9, 12
Kaiser Aluminum & Chemical Corp. v. *United States*, Ct. Cl. No. 49-63, Docket Entries 9
Keleket X-Ray Corp. v. *United States*, 275 F. 2d 167 (D.C. Cir. 1960) 21
Lynch v. *United States*, 292 U.S. 571 (1934) 13, 19, 20
Gerhardt F. Meyne Co. v. *United States*, 110 Ct. Cl. 527, 76 F. Supp. 811 (1948) 18
Anthony P. Miller, Inc. v. *United States*, 161 Ct. Cl. 455, *cert. denied* 375 U.S. 879 (1963) 17
Nager Electric Co. v. *United States*, 177 Ct. Cl. 234, 368 F. 2d 847 (1966) 21
Pan American Petroleum Corp. v. *Federal Power Commission*, 287 F. 2d 469 (10th Cir. 1961) 21
Perry v. *United States*, 294 U.S. 330 (1935) 19, 20
Prentis v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908) 17
St. Joseph Iron Works v. *Farmers Mfg. Co.*, 106 F. 2d 294 (4th Cir. 1939) 21

Page

Terteling v. *United States*, 167 Ct. Cl. 331, 334 F. 2d 250 (1964) 21, 22
Texas Gas Transmission Corp. v. *Shell Oil Co.*, 363 U.S. 263 (1960) 21
United States v. *Bostwick*, 94 U.S. 53 (1877) 18
United States v. *King*, 395 U.S. 1 (1969) 18
Warren Petroleum Corp. v. *Federal Power Commission*, 282 F. 2d 312 (10th Cir. 1960) 21
Wunderlich Contracting Co. v. *United States*, 173 Ct. Cl. 180, 351 F. 2d 956 (1965) 17

CONSTITUTION OF THE UNITED STATES

Amendment V 3, 19
Amendment XIV, Section 4 ..... 3, 19

STATUTES

28 U.S.C. § 1255 (1) (1964) 2
28 U.S.C. § 1491 (1964) 3, 9, 17
28 U.S.C. § 2501 (1964) 3, 9, 21, 23
28 U.S.C. § 2517(a) (1964) 16
50 U.S.C. App. § 2062 (1952) 4, 10
50 U.S.C. App. § 2093 (1952) 5, 14, 15
50 U.S.C. App. § 2153 (1952) 5, 15

EXECUTIVE ORDERS

Executive Order No. 10161 § 303(b), 3 C.F.R. (1949-1953 Comp.) 340 15
Executive Order No. 10281 § 201, 3 C.F.R. (1949-1953 Comp.) 781, 50 U.S.C.A. App. § 2071 (1951) 15
Executive Order No. 10480 §§ 303, 604, 3 C.F.R. (1949-1953 Comp.) 962, 50 U.S.C.A. App. § 2153 (1971 Supp.) 15

MISCELLANEOUS

Comp. Gen. Dec. B-135893 (1958) 8
The Federalist No. 78 (Everyman's Ed. 1934) (Hamilton) 17

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No.

REYNOLDS METALS COMPANY, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner Reynolds Metals Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on February 19, 1971.

OPINION BELOW

The opinion of the United States Court of Claims and the dissenting opinion of Judge Collins are reported at — Ct. Cl. —, 438 F.2d 983 (Appendix, pp. 1a-11a).

JURISDICTION

The judgment of the Court of Claims was entered on February 19, 1971, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255 (1) (1964).

QUESTIONS PRESENTED

The Administrator of General Services, as the President's delegate under the Defense Production Act, gave "most favored seller agreements" to Reynolds and other aluminum producers as an inducement to make substantially identical, guaranteed-market, aluminum supply contracts with the United States. The court below held that Reynolds' suit for no less favorable treatment, after a 1968 payment to Reynolds' competitor, was necessarily "a claim for breach of [the supply contracts] which is barred by limitations" because the payment, made pursuant to a judgment of the Court of Claims and not by the General Services Administration acting independently, constituted "sovereign action" which could not provide a foundation for a claim under the most favored seller agreement (Appendix, pp. 8a-9a).

The questions presented are:

1. Whether the disparate payment to Reynolds' competitor pursuant to a judgment of the Court of Claims constituted a breach of the most favored seller agreement.

2. Whether the most favored seller agreement with Reynolds obligated the United States, and not only General Services Administration, to give

Reynolds treatment equal to that afforded to its competitor.

3. Whether Reynolds' claim founded upon the most favored seller agreement and filed in the Court of Claims on October 21, 1968 was barred by 28 U.S.C. § 2501 (1964).

Constitutional and Statutory Provisions Involved

Constitution of the United States:

Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 4. The validity of the public debt of the United States, authorized by law . . . shall not be questioned.

United States Code, Title 28 (1964):

§ 1491. Claims against United States generally . . .

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

§ 2501. Time for filing suit

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

* * *

United States Code, Title 50 Appendix (1952):

§ 2062. Declaration of policy [Defense Production Act of 1950]

It is the policy of the United States to oppose acts of aggression and to promote peace by insuring respect for world law and the peaceful settlement of differences among nations. To that end this Government is pledged to support collective action through the United Nations and through regional arrangements for mutual defense in conformity with the Charter of the United Nations. The United States is determined to develop and maintain whatever military and economic strength is found to be necessary to carry out this purpose. Under present circumstances, this task requires diversion of certain materials and facilities from civilian use to military and related purposes. It requires expansion of productive facilities beyond the levels needed to meet the civilian demand. . . .

It is the objective of this Act to provide the President with authority to accomplish these adjustments in the operation of the economy. It is the intention of the Congress that the President shall use the powers conferred by this Act to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and foreign policy objectives, and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian use, within the framework, as far as practicable, of the American system of competitive enterprise.

§ 2093. Purchases of raw materials and installation of equipment—(a) Purchases for use or resale; development of strategic minerals and metals . . .

To assist in carrying out the objectives of this Act the President may make provision (1) for purchases of or commitments to purchase metals, minerals, and other materials, for Government use or resale; and (2) for the encouragement of exploration, development, and mining of critical and strategic minerals and metals. . . .

Terms and conditions of purchase

(b) Subject to the limitations in subsection (a) purchases and commitments to purchase and sales under such subsection may be made without regard to the limitations of existing law, for such quantities, and on such terms and conditions, including advance payments, and for such periods, . . . as the President deems necessary, . . .

§ 2153. Delegation of authority; creation of new agencies . . .

(a) Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency of the Government, including any new agency or agencies (and the President is authorized to create such new agencies, other than corporate agencies, as he deems necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate. . . .

STATEMENT OF THE CASE

During the Korean War, the United States, acting through the Administrator of General Services pursuant to a delegation from the President under the Defense Production Act of 1950, entered into substantially identical contracts with Aluminum Company of America, Kaiser Aluminum & Chemical Corporation and Reynolds Metals Company for the purchase of primary aluminum.

As an inducement to the producers to enter into the supply contracts, the Administrator also executed a most favored seller agreement with each producer. These agreements entitled the producers to equality of interpretation and treatment under the supply contracts, as well as equality in the terms of those contracts. *Kaiser Aluminum & Chemical Corp.* v. *United States*, 181 Ct. Cl. 902, 926, 388 F.2d 317, 330-31 (1967) (Appendix, pp. 35a-36a).

Each supply contract provided for the production within a stated period of a specified quantity of primary aluminum of a minimum grade of ninety-nine percent (99%) aluminum, which was defined as "additional production." Each producer agreed to finance, construct and operate facilities to produce the additional quantities of aluminum, and to make certain percentages of the additional production available to non-integrated users. In consideration of these commitments, the United States agreed that it would purchase any additional production, as defined, which a producer did not itself utilize or sell to others during the production period.

Joint meetings were held between the Government and the producers to resolve problems of contract administration and interpretation, which included the

need for a uniform method of reporting production and of computing additional production to measure the producers' tender rights and fix the Government's obligation to take additional production. No agreement was ever reached, however, on a uniform method for the periodic reporting of production from the additional facilities or for computing additional production, for contract purposes, for the period which ended March 31, 1957. In September 1957, after separate negotiations with the several producers, the United States entered into a supplemental agreement with each producer which established a specified method for computing additional production after March 31, 1957.

As the contract production periods neared an end with aluminum in long supply, and when the remaining amount of additional production which the Government was obligated to purchase under the supply contracts was being computed, Kaiser contended that the contract definition of additional production did not include *any* offgrade metal, i.e., aluminum of a purity of less than ninety-nine percent (99%), or alloys. Kaiser had included all its offgrade metal in periodically *reporting* its production. It contended, however, that for the purpose of *computing* additional production under its contracts, it was entitled to exclude from its reported production for the period prior to March 31, 1957 *all* offgrade metal, as well as alloys, and thus that it still was entitled to tender to the Government aluminum in an amount equal to such exclusions. Kaiser also asserted that under its most favored seller agreement it was entitled to make the exclusions because Reynolds had made similar exclusions.

In both periodically *reporting* production and in *computing* additional production for the earlier period,

Reynolds included all metal with an average purity of ninety-nine percent (99%). By this method it included in additional production more than eighty-four percent (84%) of its offgrade metal, aluminum of a purity of less than ninety-nine percent (99%).

The claim of Kaiser was submitted to the Comptroller General. While it was pending before him, the then Administrator of General Services, in a letter dated May 9, 1958, advised the Comptroller General of his understanding of the position of Reynolds. He stated in part:

> "If Reynolds Metals had excluded subpurity metal in the manner now advocated by Kaiser Aluminum, the amount of its exclusions would have been far greater. Indeed, Reynolds Metals has advised GSA that, if the production by Kaiser Aluminum is so recomputed, Reynolds Metals would insist upon the same right."

Reynolds consistently relied upon the assurances of the most favored seller agreement. In the negotiations leading to the September 1957 amendment of the Reynolds supply contracts, Reynolds had been requested to waive its rights under that agreement and had declined to do so. On June 6, 1958 the Comptroller General declined to take action on the claim of Kaiser (Comp. Gen. Dec. B-135893), and the Administrator refused to accept the tenders of additional aluminum from Kaiser.

In February 1963 Kaiser filed a petition in the Court of Claims claiming damages arising from the refusal of the Government to accept the tenders. On December 15, 1967 the Court of Claims entered judgment for Kaiser in the amount of $7,198,655.55. *Kaiser Aluminum & Chemical Corp.* v. *United States,* 181 Ct. Cl.

902, 388 F.2d 317 (Appendix, p. 12a). A certificate of settlement was issued by the General Accounting Office and payment of the amount of the judgment was made to Kaiser by the Department of the Treasury in July 1968 (*Kaiser Aluminum & Chemical Corp.* v. *United States,* Ct. Cl. No. 49-63, Docket Entries, p. 7). After the filing of the claim of the petitioner under its most favored seller agreement, as set forth below, the United States filed a motion for relief from the judgment for Kaiser. This motion was denied. *Kaiser Aluminum & Chemical Corp.* v. *United States,* 187 Ct. Cl. 443, 409 F.2d 238 (1969) (Appendix, p. 47a).

On July 11, 1968 the petitioner, in accordance with its consistent position concerning its rights under its most favored seller agreement, filed with the Administrator of General Services a claim under that agreement for damages to its competitive position in the amount of $7,898,479 arising from the disparate payment to Kaiser. After the Administrator declined to take action on its claim, the petitioner on October 21, 1968 filed a petition in the Court of Claims, invoking the jurisdiction of that court under 28 U.S.C. § 1491 (1964).

On April 23, 1970 the United States filed a motion "for summary judgment dismissing the petition for the reason that the Court lacks jurisdiction of this cause as the asserted claim accrued more than six years before the filing of the petition, and accordingly, is barred by the Statute of Limitations, 28 U.S.C. § 2501."

The Court of Claims granted the motion and dismissed the petition. It held that the most favored seller agreement "is framed solely as an obligation of the GSA itself" (Appendix, p. 8a) and that GSA

itself had offered to Reynolds and Kaiser the same terms and uniform interpretation (Appendix, p. 6a). It said that even if the words of the agreement "can be read as binding other executive agencies, it is hard to stretch them further to blanket the courts and Congress as well" and that "the governmental liability [to Kaiser] was judicially created, the funds to satisfy it were granted by Congress, and payment itself was made by the Controller-General." (Appendix, p. 8a). It held that these "sovereign acts" did not constitute a breach of "the contractual obligation under the equal-treatment clause" for which Reynolds could recover. The court concluded "that plaintiff Reynolds is necessarily suing upon a claim [under the supply contracts] for breach of contract which is barred by limitations. . . . If Reynolds insists that the favored-nation provision must nevertheless be taken as the foundation for its suit, then it has failed to state a claim upon which relief can be granted." (Appendix, p. 9a).

Judge Collins dissented (Appendix, p. 10a).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Express Terms of the Government's Pledge of Equal Treatment and Impugns the Government's Business Integrity

The principal vice of the judgment below is that it calls into question the credibility of the contractual engagements of the United States. The most favored seller agreement was an extraordinary agreement given under emergency Presidential war powers. The controlling legislation directed that the powers be used "within the framework, as far as practicable, of the American system of competitive enterprise." 50 U.S.C. App. § 2062 (1952). Equality of treatment under the

aluminum supply contracts was essential to obviate unintended competitive effects from industry's participation in the aluminum expansion program designed to meet the expanded civilian and military needs of the Korean War emergency.

The Government's guarantee of protection from competitive harm, in the form of the most favored seller agreement, was important to the private financing arrangements for the large investment in new plant and equipment required to carry out such an expansion program. Competitive market position during and after the expansion would depend upon it in this basic industry in which competition was then relatively young, having received its major impetus from the Government itself when the surplus World War II aluminum plants were sold under a carefully devised disposal program.

The guarantee of equal treatment was also important as a catalyst for agreement in the negotiation and in the administration of the aluminum supply contracts. Each participant, with the assurance of the most favored nation agreement that it would be treated no less favorably than any other participant in the program, was spared the necessity of relying on self-help measures to protect its competitive position. This eliminated the incentive to procrastinate in negotiations to assure that competitors would not get better bargains or greater benefits. Otherwise, individual producer agreements with the Government on the administrative decisions, interpretations and recommended solutions to the inevitable problems of performance of complex agreements would have been virtually impossible.

The supply contracts of the aluminum producers, therefore, not only were made upon assurances of the most favored seller agreement, but amendments of the contracts containing key administrative interpretations and provisions for the completion of performance of the contracts were negotiated on an individual basis, also in reliance upon the most favored seller agreement. The Government was fully aware that Reynolds, in accepting payment in accordance with the Government's interpretation of its supply contracts, did so in reliance on the assurances of the Government under the most favored seller agreement. See concurring opinion of Judge Cowen in *Kaiser Aluminum & Chemical Corp.* v. *United States,* 187 Ct. Cl. 443, 452-53, 409 F.2d 238, 243 (1969) (Appendix, pp. 56a-57a).

The view held by the court below of the obligation of the most favored seller agreement effectively nullifies and renders illusory the express assurance of the Government that Reynolds would receive no less favorable treatment than its competitors. The decision below held that the most favored seller agreement was not effective protection against more favored treatment of a competitor because such treatment arose from judicial rather than administrative action with regard to the aluminum supply contracts. In contrast, the decisions of the court below in *Kaiser Aluminum & Chemical Corp.* v. *United States,* 181 Ct. Cl. 902, 388 F.2d 317 (1967), 187 Ct. Cl. 443, 409 F.2d 238 (1969) (Appendix, pp. 12a and 47a) interpreted the most favored seller agreement with Kaiser to include a guarantee of uniform treatment under the contract terms without limiting it simply to administrative action (Appendix, pp. 35a-36a, 50a-51a). Uniform terminology inserted in the aluminum supply contracts pursuant to the most

favored seller agreement obviously would be meaningless, making the whole agreement an empty exercise, unless that were so. The ever-present possibility that matters of contract interpretation may not finally be resolved without court litigation virtually assures that a most favored nation agreement would be ineffective unless it is construed to protect against competitive harm flowing from benefits conferred on a competitor by court decision as well as by administrative action.

If allowed to stand, the decision below will diminish the usefulness of a contractual tool which is vitally essential to the Government in times of emergency, and will contravene in large measure the purpose of Congress in granting to the President extraordinary powers to contract by such legislation as the Defense Production Act of 1950. See *Central Bank* v. *United States,* 345 U.S. 639, 646-47 (1953). Such powers are needed whenever the Government seeks to mobilize the productive capacity of a major segment of the economy to meet national demands of peace, as well as war.

This Court has said: "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." *Lynch* v. *United States,* 292 U.S. 571, 580 (1934). Here that can be accomplished only by reversing the decision below which, by its refusal to honor an express pledge of the Government after reliance placed upon it by Reynolds, has cast doubt on the credibility of the Government's contract obligations that will impugn the Government's business integrity if allowed to stand.

2. The Decision Below Is in Conflict With the Defense Production Act of 1950

The court below held that because of the use of the term "this Administration" in the most favored seller agreement (Appendix, p. 2a), it was "framed solely as an obligation of the GSA itself." (Appendix, pp. 6a-8a). In fact, however, the Administrator of General Services had no authority to make independent agreements, binding only upon himself and his Administration, concerning the amendment or interpretation of contracts of the United States entered into under the Defense Production Act. When he entered into the most favored seller agreement with Reynolds, he acted on behalf of the United States under delegated authority. It is specious to suggest that the agreement was not binding upon the United States. Indeed, the agreement was offered to the producers as an inducement from the Government of the United States to make the aluminum supply contracts with the United States to expand the production and capacity of the industry as authorized by the Congress in the emergency legislation; and in *Kaiser Aluminum & Chemical Corp.* v. *United States,* 181 Ct. Cl. 902, 388 F.2d 317 (1967) the Court of Claims itself construed both the supply contracts and the most favored seller agreements as obligations of the United States (Appendix, pp. 14a, 32a-36a).

Under the Defense Production Act of 1950 broad emergency powers were vested in the President, including the power to make provision for the purchase of metals without regard to the limitations of existing law and on such terms and conditions as the President deemed necessary. 50 U.S.C. App. § 2093 (1952). The President was authorized to delegate this power to any

officer or agency of the Government. 50 U.S.C. App. § 2153 (1952).

By Executive Order No. 10161 § 303(b), 3 C.F.R. (1949-1953 Comp.) 340 the authority to purchase metals was on September 9, 1950 delegated to the Administrator of General Services.[1] When the Administrator executed the aluminum supply contracts he acted pursuant to this delegation. The contracts were signed in the name of the United States by the Administrator. When the Administrator entered into the most favored seller agreements with the producers, as an inducement to them to undertake the obligations set forth in the supply contracts, he patently acted on behalf of the United States pursuant to the same delegation of authority.

3. The Decision Below Is in Conflict With Decisions of This Court and of the Court of Claims Itself on Sovereign Action

The court below denied the claim of Reynolds and nullified its most favored seller agreement by an incorrect application of the sovereign action doctrine. The decision thereby contravenes basic principles of government of enduring public importance.

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[1] By Executive Order No. 10281 § 201, 3 C.F.R. (1949-1953 Comp.) 781, 50 U.S.C.A. App. § 2071 (1951), the President on August 28, 1951 transferred the delegation of his authority under 50 U.S.C. App. § 2093 (1952) from the Administrator of General Services to the Defense Materials Procurement Administrator. The same person served in both capacities. On August 14, 1953, by Executive Order No. 10480 §§ 303, 604, 3 C.F.R. (1949-1953 Comp.) 962, 50 U.S.C.A. App. § 2153 (1971 Supp.) Defense Materials Procurement Administration was abolished and the authority to purchase metals was redelegated to the Administrator of General Services, as such.

Judge Collins, in his dissenting opinion, summarized the decision of the court as follows:

> "It seems to me that the crux of the court's opinion is that Reynolds' most favored nation agreement with the Government was not breached by the more favorable treatment accorded Kaiser because Kaiser's more favorable treatment was brought about by a decision of this court and not by the independent action of the GSA. This narrow construction of such an extraordinary agreement appears to me to be inconsistent with this court's opinion in *Kaiser I* as well as with the spirit of the agreement itself." (Appendix, p. 10a).

The obligation of the United States to Reynolds under the agreement was not absolved, and the performance of the obligation was not in any way precluded, by any sovereign action of any branch of the Government. The defense of sovereign action was not even suggested by the defendant in the court below.

Demonstrably it is not sovereign action *of a public and general nature* when the Court of Claims renders judgment on a specific claim founded on a contract, the Congress appropriates funds to satisfy the judgment and the General Accounting Office certificates the judgment for payment under 28 U.S.C. § 2517(a) (1964). Even where there is action of a public and general nature, the United States is not relieved of a contractual obligation by such action unless it prevents or makes impossible the performance of the obligation, in the same manner in which it would prevent or make impossible the performance of a similar obligation of a private party. Furthermore, where the United States specifically contracts, as it did here, to hold the other contracting party harmless against its own action, the

other party is protected even against action of a public and general nature.

The cases cited by the court below in support of its application of the sovereign action doctrine (Appendix, p. 9a) hold only that the Government, acting in its contractual capacity, may, like a private contractor, be relieved of a contractual obligation *if* its performance is prevented or made impossible by sovereign action of *a public and general nature*. *Horowitz* v. *United States*, 267 U.S. 458 (1925); *Wunderlich Contracting Co.* v. *United States*, 173 Ct. Cl. 180, 195-96, 351 F.2d 956, 966-67 (1965); *Air Terminal Services, Inc.* v. *United States*, 165 Ct. Cl. 525, 534-36, 330 F.2d 974, 979-80, *cert. denied* 379 U.S. 829 (1964); *Anthony P. Miller, Inc.* v. *United States*, 161 Ct. Cl. 455, 471-73, *cert. denied* 375 U.S. 879 (1963). This is the holding of a line of cases beginning with *Jones* v. *United States*, 1 Ct. Cl. 383 (1865).

The inapposite application of the doctrine by the court below rests solely upon the premise that "the governmental liability [to Kaiser] was judicially created, the funds to satisfy it were granted by Congress, and payment itself was made by the Controller-General." (Apendix, p. 8a). Under 28 U.S.C. § 1491 (1964) the Court of Claims has jurisdiction "to render judgment upon" specific claims founded upon contract. "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. This is its purpose and its end." *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). See The Federalist No. 78, at 395-96 (Everyman's Ed. 1934) (Hamilton). This Court has recently held that the Court of Claims may render judgment only for money found actually and

presently due from the United States to a claimant. *United States* v. *King,* 395 U.S. 1 (1969). The Court of Claims plainly has no jurisdiction to "judicially create" a liability of the United States. It seems equally plain that the rendition of judgment on a specific contractual claim is not sovereign action of a public and general nature. Likewise, the appropriation of funds for payment of a judgment and the certification of payment is action requisite only for the satisfaction of an actual, present contractual obligation of the United States, which has no public and general significance. It is patent that no action of the Court of Claims, the Congress or the General Accounting Office prevented or made impossible the performance of the Government's obligations to Reynolds under its most favored seller agreement.

Even where there is governmental action of a public and general nature which prevents performance, the defense of sovereign action does not relieve the Government from liability if it has agreed, either specifically or by implication, to hold the other contracting party harmless from the action which it may take. *United States* v. *Bostwick,* 94 U.S. 53 (1877); *D & L Construction Co.* v. *United States,* 185 Ct. Cl. 736, 402 F.2d 990 (1968); *Saul Freedman* v. *United States,* 162 Ct. Cl. 390, 401-02, 320 F.2d 359, 365-66 (1963); *Gerhardt F. Meyne Co.* v. *United States,* 110 Ct. Cl. 527, 76 F. Supp. 811 (1948). Here the Government specifically agreed to hold Reynolds harmless against unequal treatment which it might give to Kaiser and the payment to Kaiser constituted such unequal treatment.

4. The Decision Below Is in Conflict With Decisions of This Court Interpreting the Fifth and Fourteenth Amendments to the Constitution of the United States

The Government's failure to treat Reynolds in the same manner as Kaiser, as rationalized by the court below, would abrogate and destroy the rights of Reynolds under its most favored seller agreement. The court's interpretation reads the agreement out of existence. Indeed, its opinion said that the "claim would be precisely the same if the most favored nation article had been omitted from Reynolds' contract" (Appendix, p. 6a). Its interpretation thus constitutes a denial of the validity and integrity of a public obligation and countenances a taking of the agreement.

"When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." *Perry* v. *United States,* 294 U.S. 330, 352 (1935). In construing the obligations of the United States under a War Risk Insurance contract, Mr. Justice Brandeis, speaking for this Court, said: "Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch* v. *United States,* 292 U.S. 571, 579 (1934).

Section 4 of the Fourteenth Amendment explicitly declares that the "validity of the public debt of the United States, authorized by law, . . . shall not be questioned." The validity of the public debt embraces "whatever concerns the integrity of the public obligations." *Perry* v. *United States,* 294 U.S. 330, 354 (1935).

The court below held that the disparate payment to Kaiser did not breach the most favored seller agreement of Reynolds because the acts of the court, the Congress and the General Accounting Office in connection with the payment constituted "sovereign action." *Perry* and *Lynch* establish, however, that the United States may not, even by purported sovereign action, abrogate or take the rights of a private party arising from a contract with the United States. Neither may it destroy the integrity and validity of its obligations.

5. The Decision Below Is in Conflict With Decisions of Courts of Appeals and of the Court of Claims Itself Concerning the Accrual of a Claim

The holding of the court below, if allowed to stand, "would mean that a suit . . . could be barred before it came into existence. Such an application of the limitation provision would produce an incongruity which . . . should not be made." See *Chicago, Rock Island & Pacific Railway Co.* v. *United States*, 220 F.2d 939, 942 (7th Cir. 1955).

Reynolds instituted suit in the Court of Claims within six years after Kaiser filed its petition in that court, within ten months after the judgment which resulted in the payment to Kaiser, and about three months after the payment was actually made. It was this payment which breached Reynolds' most favored seller agreement and damaged its competitive position in the aluminum industry, as recognized by Judge Collins in his dissenting opinion below:

> "Properly interpreted, the agreement guaranteed equality of treatment under the contract. This meant that any time one of the contractors received a benefit under its contract owing to an interpretation of the contract, regardless of the

origin of the benefit, which was not extended to another contractor, the latter's most favored nation agreement was breached." (Appendix, p. 11a).

First accrual under 28 U.S.C. § 2501 (1964) takes place when all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue for his money. *Nager Electric Co.* v. *United States,* 177 Ct. Cl. 234, 368 F. 2d 847 (1966).

Claims against the United States under contract or by operation of law not infrequently accrue as a consequence of action in a separate but related judicial proceeding, which results in damage to the claimant. *Terteling* v. *United States,* 167 Ct. Cl. 331, 334 F.2d 250 (1964); *Keleket X-Ray Corp.* v. *United States,* 275 F.2d 167 (D.C. Cir. 1960); *Chicago, Rock Island & Pacific Railway Co.* v. *United States,* 220 F.2d 939 (7th Cir. 1955). A claim may accrue against the United States when it has involuntarily breached a contract and caused damage to a claimant because of a court order in a related proceeding. *A.R.S. Inc.* v. *United States,* 157 Ct. Cl. 71 (1962).

The obligations under a most favored nation agreement are continuing in nature, and a claim accrues under such an agreement when the protected party suffers detriment because more favored treatment is accorded to a third party. See *Texas Gas Transmission Corp.* v. *Shell Oil Co.,* 363 U.S. 263 (1960); *Pan American Petroleum Corp.* v. *Federal Power Commission,* 287 F.2d 469 (10th Cir. 1961); *Warren Petroleum Corp.* v. *Federal Power Commission,* 282 F.2d 312 (10th Cir. 1960); *Cold Metal Process Co.* v. *McLouth Steel Corp.,* 170 F.2d 369 (6th Cir. 1948); *St.*

Joseph Iron Works v. *Farmers Mfg. Co.*, 106 F.2d 294 (4th Cir. 1939); *Consolidated Gas, Electric Light & Power Co.* v. *United Railways & Electric Co.*, 76 F.2d 535 (4th Cir. 1935); *California Electric Power Co.* v. *United States*, 104 Ct. Cl. 289, 60 F. Supp. 344 (1945); *Aerovias Interamericanas de Panama, S.A.* v. *Board of County Commissioners*, 197 F. Supp. 230 (S.D. Fla. 1961), *rev'd on other grounds sub nom., Board of County Commissioners* v. *Aerolineas Peruanasa, S.A.*, 307 F.2d 802 (5th Cir. 1962), *cert. denied*, 371 U.S. 961 (1963). See also *Aktiebolaget Bofors* v. *United States*, 139 Ct. Cl. 642, 153 F. Supp. 397 (1957).

"It is too well established to require citation of authority that a claim does not accrue until the claimant has suffered damages." *Terteling* v. *United States*, 167 Ct. Cl. 331, 338, 334 F.2d 250, 254 (1964). Here the most favored seller agreement was not breached and Reynolds did not suffer damage to its competitive position, which was protected by the agreement, until the disparate payment was made to Kaiser.

It is difficult, if not impossible, to reconcile note 6 to the decision below with the court's application of the statute of limitations. In note 6 the court said:

> "The case would come to us on a different footing if our *Kaiser I* decision stood alone, that is, if Kaiser's recovery had come to rest solely on the ground of GSA's breach of its most favored nation agreement. We intimate no view on whether Reynolds' action brought in October 1968 would be timely in those circumstances." (Appendix, p. 8a).

In point of fact, payment was made to Kaiser, in satisfaction of the first judgment of the court, almost twenty-one months before the second decision, and

Reynolds filed its petition about three months after the payment and about eighteen months before this second decision. It was the disparate payment to Kaiser, not either of the decisions of the court, which damaged the competitive position of Reynolds and breached its most favored seller agreement.

How a change in the basis of the court's decision subsequent to the payment could alter or abrogate this fundamental fact is not made clear.[2] The claim of Reynolds accrued when the payment was made to Kaiser, and thus it was not barred by 28 U.S.C. § 2501 (1964).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

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May 19, 1971

[2] Neither is it made clear how the second decision might have been more "sovereign" or of greater public and general significance than the first.

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 321-68

(Decided February 19, 1971)

REYNOLDS METALS COMPANY

v.

THE UNITED STATES

James L. Kaler, attorney of record, for plaintiff. *Fred R. Edney, Chisman Hanes* and *Kaler, Worsley, Daniel & Hollman,* of counsel.

Frances L. Nunn, with whom was *Assistant Attorney General William D. Ruckleshaus,* for defendant.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges.*

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge,* delivered the opinion of the court:

Reynolds Metals invokes for this claim the blue-blooded parentage of *Kaiser Aluminum & Chemical Corp.* v. *United States,* 181 Ct. Cl. 902, 388 F. 2d 317 (1967), 187 Ct. Cl. 443, 409 F. 2d 238 (1969), but the child turns out to be a changeling rather than a true heir. The facts are the same (we can assume) but Reynolds, unlike Kaiser, waited beyond the magic period of six years.

During the Korean emergency the Government undertook to secure expansion of primary aluminum manufacturing facilities in order to increase the supply of that commodity to meet the demands generated by the war effort. The General Services Administration (GSA) entered into contracts with leading aluminum producers, including Reynolds, which agreed to finance, construct and operate reduction plants and to produce certain quantities of the metal. In return, GSA agreed to purchase all of the production in such additional facilities, up to specified quantity limits, that the companies were unable to sell or otherwise utilize.

The Reynolds contracts were made in 1950 and 1951 and provided for the manufacture of a total of 1,600,000,000 pounds of primary aluminum. These agreements were substantially similar to contracts executed at the same time between GSA and Kaiser as well as the Aluminum Corporation of America (Alcoa).

As part of these agreements, the Administrator of the General Services Administration granted each contractor the right to incorporate into its agreement any contract terms negotiated by GSA with the other producers, if the particular contractor believed that such terms were more favorable than those contained in its own contract. This commitment is known to this litigation as the "most favored nation" or "most favored seller" agreement.[1]

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[1] Reynolds' most favored nation agreement was contained in the following letter:

"GENERAL SERVICES ADMINISTRATION
WASHINGTON
OFFICE OF THE ADMINISTRATOR
November 24, 1950

Mr. Richard S. Reynolds, Jr.
President, Reynolds Metals Co.
Richmond, Virginia

Dear Richard:

This is to confirm my telephone conversation with you of this morning. You will recall that I officially committed this Administration to amend any agreement we might reach on the expanded capacity of your company if later agreements with the Aluminum Company of America and/or the Kaiser Aluminum and Chemical Company are, in your opinion, more favorable than the agreement which has been executed with you.

Such amendments will be for the purpose of bringing your contract into conformity with agreements of the aforesaid companies.

Sincerely yours,

(Signed) JESS LARSON
Jess Larson
Administrator"

This agreement was reaffirmed by letters dated August 25, 1951 and May 6, 1954 from the General Services Administration to Reynolds.

The contracts between GSA and Kaiser have twice come before this court. The ultimate issue was whether the quantity limit of the "put" granted Kaiser had been reached, that is, whether the GSA had purchased all of the additional production of aluminum it was required to under the contract. The resolution of that issue in turn depended on the propriety of GSA's requirement that Kaiser include its production of offgrade metal (aluminum of less than 99% purity) in the computation of its total contract production. In *Kaiser I, supra,* 181 Ct. Cl. 902, 388 F. 2d 317 (1967), the court, under the belief (fostered by the defendant) that Reynolds had been permitted by the GSA to exclude its offgrade production, held that the Government had breached its most favored nation commitment by denying Kaiser the same treatment.

After our *Kaiser I* decision Reynolds demanded an additional sum from the Administrator of GSA as due under its contracts, alleging that both Reynolds and Kaiser had included offgrade metal in their production computations. Reynolds told the GSA that the award of judgment to Kaiser based on a recomputation of production which excluded offgrade constituted a preference of Kaiser over Reynolds in violation of the favored nation clause.

The defendant then moved the court for relief from the *Kaiser I* judgment, belatedly questioning the existence of the disparity of treatment which it had previously conceded and which was the foundation of our ruling. In *Kaiser II, supra,* the court's opinion on that motion, we chose to abandon the most favored nation principle as *ratio decidendi,* and instead held that the substantive terms of the Kaiser contract mandated the exclusion of offgrade production.[2] That theory had been urged as an alternative ground for recovery in *Kaiser I,* but had not been reached by the court.

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[2] *Kaiser Aluminum & Chemical Corp.* v. *United States, supra,* 187 Ct. Cl. 443, 448, 450-51, 409 F. 2d 238, 240-41, 242 (1969).

Meanwhile, in October 1968, after GSA had refused its demand for payment, Reynolds brought this suit, claiming that the Government had breached its duty of equal treatment under the most favored nation clause. The defendant now moves for summary judgment, asserting that any action Reynolds may have under its contracts is barred by limitations.

Our familiar limitations statute, section 2501 of Title 28 of the U.S. Code, provides that every claim of which the Court of Claims has jurisdiction shall be barred *unless* a petition is filed within six years after the claim first accrues. Thus, Reynolds' cause of action cannot have accrued prior to October 1962. The contracts with which we are concerned were made in 1950 and 1951. In September 1957 the parties agreed on a method of computation of primary aluminum production for the period beginning April 1, 1957. This suit relates solely to production prior to that date.

If there were no most-favored-nation coloration to the case, there would be, as the defendant points out, several possible times of accrual of the claim—all more than six years past. First, since the material terms of Reynolds' contracts are conceded to be substantially the same as in *Kaiser*, we can assume that those terms required the exclusion of offgrade production from contract computation. The insistence of GSA that Reynolds include such metal would therefore constitute a contract breach at some point prior to April 1, 1957 (after which a new formula came into effect, see *supra*), for which an immediate action could lie. *Cf. Henry Products Co.* v. *United States*, 180 Ct. Cl. 928 (1967). Another possible time is the expiration dates for the production periods involved, the latest of which was November 1959. All of the acts necessary to create defendant's liability had occurred by then, and plaintiff could have assessed its quantum of damages at that time. See *Terteling* v. *United States*, 167 Ct. Cl. 331, 337-38, 334 F. 2d 250, 254-5 (1964). At the very latest, Reynolds' cause of

action for substantive breach ripened at the time of final payment under the contracts. *Nager Electric Co.* v. *United States,* 177 Ct. Cl. 234, 240 nn. 4 & 5, 368 F. 2d 847, 851-52 nn. 4 & 5 (1966); *Acorn Decorating Corp.* v. *United States,* 146 Ct. Cl. 394, 398, 174 F. Supp. 949, 951-52 (1959). These last payments were made in January and February 1961. The result is that this action is time-barred if we compute the six years from any traditional point of accrual for contractual actions against the Government.[3]

Reynolds contends, however, that all of this learning is off-target because the contracts contain a most favored nation clause, and this suit is for a breach of that obligation which occurred only when the defendant paid Kaiser more than seven million dollars in damages in 1968 as directed by our judgment in *Kaiser I.* It is said that the cause of action founded on that obligation exists independently of any substantive cause of action under the contract, and that the petition was therefore filed within six years of the claim's accrual.

We can agree, of course, that a party to a contract may breach a duty of equal treatment without simultaneously violating any of its other obligations, see *Kaiser Aluminum & Chemical Corp.* v. *United States,* 152 Ct. Cl. 641, 287 F. 2d 890 (1961) (a case involving Kaiser's purchase of surplus aluminum plants) and *Kaiser I, supra,* and also assume in that situation that the protected party's cause of action accrues when a third party receives the more favorable treatment. See *Aerovias Interamericanas De Panama, S.A.* v. *Board of County Commissioners,* 197 F. Supp. 230 (S.D. Fla. 1961), *rev'd on other grounds,* 307 F. 2d 802 (C.A. 5, 1962), *cert. denied,* 371 U.S. 961 (1963). But these propositions do not help plaintiff because, taking all its factual allegations as true, it fails to assert any real violation of the defendant's obligation to treat it as favorably as the

[3] We do not have to decide which method would be the correct one.

other sellers. Despite plaintiff's argument, the only acceptable basis of this action is the breach of the substantive provisions of the contracts—the same clauses on which Kaiser ultimately recovered for breach of its agreement. The claim would be precisely the same if the most favored nation article had been omitted from Reynolds' contract, and that clause, rightly read, cannot serve to revive it or to sustain any independent demand. The equal treatment clause, to which plaintiff tries to pin its whole case is simply irrelevant to the only valid cause of action which plaintiff can and does put forward—a claim for breach of the substantive "put" provisions of its contracts.

In the most favored nation portion of the agreements, GSA did not guarantee that Reynolds would wind up in the same position, economically, as Kaiser or any other seller. The agency undertook a narrower obligation in its November 24, 1950 letter; it committed "this administration" (referring to GSA) to amend any agreement reached with Reynolds if later compacts with other sellers were, in Reynolds' judgment, more favorable than its own contract.[4] As construed in *Kaiser I*, this promise entitled Reynolds to the same terms, if it wished, as those granted the other producers, and to uniform interpretation of those terms by GSA. 181 Ct. Cl. at 926, 388 F. 2d at 330-31. Admittedly, there has been no breach of those two requirements. Reynolds' contracts contained the same provision with respect to computation of production as did Kaiser's. Also, according to the petition, GSA interpreted those provisions for Reynolds in the same way as it did for Kaiser. In both instances offgrade metal was included by GSA in the computation; administratively, both producers were treated alike. The benefit Kaiser received came, not from unequal treatment by GSA, but from a new, judicial construction of

[4] See note 1, *supra*. The two subsequent confirmatory letters also expressed Reynolds' right, at its option, to have GSA amend the contract to include terms contained in the Alcoa and Kaiser contracts. *Id.*

the contract by this court as a result of a suit begun and sustained by that contractor.

In those circumstances, there is a little reason to extend the coverage of the most favored nation clause, beyond its wording, to include this type of court-created advantage. Kaiser prevailed because it had the right under its agreement to exclude offgrade production from its computation, and the GSA breached the contract by refusing to recognize that right. Significantly, Kaiser sought to enforce its right within six years of the accrual of the claim. We are assuming that Reynolds had a similar right, as it claims in its petition, since it had the same substantive clauses and the GSA treated it in the same manner. Like Kaiser, Reynolds could have brought suit within six years on the same breach claim, but it failed to do so although it knew about the Kaiser litigation. We can see no basis in logic or policy why Kaiser's recovery should generate a new cause of action for Reynolds under the most favored nation clause. That would allow a party with such a clause to wait comfortably in the shade while another does battle for his rights, and if the more industrious seller should prevail, his counterpart could leave his cool retreat to share in the bounty. This type of equal-treatment agreement is used in a variety of commercial contexts[5] to insure that a protected party will get the benefit of more advantageous terms negotiated subsequently by a competitor, but it should not relieve a party of the duty to vindicate his own rights in timely

[5] For example, in patent license agreements, see, *e.g. Cold Metal Process Co.* v. *McLouth Steel Corp.*, 170 F. 2d 369 (C.A. 6, 1948), *St. Joseph Iron Works* v. *Farmers Manufacturing Co.*, 106 F. 2d 294 (C.A. 4, 1939); in contracts for the supply of electric power, *Consolidated Gas Electric Light & Power Co.* v. *United Railways & Electric Co.*, 76 F. 2d 535 (C.A. 4, 1935), *California Electric Power Co.* v. *United States*, 104 Ct. Cl. 289, 60 F. Supp. 344 (1945); and in gas purchase contracts (prior to regulation by the FPC of sales of natural gas by producers), *Pan American Petroleum Corp.* v. *FPC*, 287 F. 2d 469 (C.A. 10, 1961), *Warren Petroleum Corp.* v. *FPC*, 282 F. 2d 312 (C.A. 10, 1960).

fashion where, as here, he can do so just as easily as his rival. A most favored nation clause is neither an unnecessary extension of the limitations period nor a refuge for the indolent or the free-rider.[6]

Moreover, it would put too much of a strain on the language of the clause to say that, in these circumstances, it secures to Reynolds any advantage Kaiser happens to receive from any arm of the Federal Government. The clause (*supra*, note 1), as we have pointed out, is framed solely as an obligation of the GSA itself. Even if the words can be read as binding other executive agencies, it is hard to stretch them further to blanket the courts and Congress as well. Yet the acts which Reynolds urges as triggering the clause had their source in those two independent branches. This court decided in Kaiser's favor over the opposition of the Department of Justice. Payment of the court's judgment was made by the General Accounting Office after a specific Congressional appropriation.[7] Thus, the governmental liability was judicially created, the funds to satisfy it were granted by Congress, and payment itself was made by the Controller-General.

It will not do to try to hurdle this obstacle by indulging the fiction that, for favored-nation purposes, the United States Government is like a single party moving with a single will. The clause is not phrased that way, and there is a long tradition separating the contractual and sovereign capacities of the Government. Its contractual duties are excused if their performance is made impossible by its

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[6] The case would come to us on a different footing if our *Kaiser I* decision stood alone, that is, if Kaiser's recovery had come to rest solely on the ground of GSA's breach of its most favored nation agreement. We intimate no view on whether Reynold's action brought in October 1968 would be timely in those circumstances.

[7] 28 U.S.C. §§ 2517(a), 2518 (1964). A specific authorization would not have been required if the judgment had been for $100,000 or less. 31 U.S.C. § 724(a) (Supp V 1970).

sovereign acts. *Horowitz* v. *United States*, 267 U.S. 458 (1925); see also, *Wunderlich Contracting Co.* v. *United States*, 173 Ct. Cl. 180, 195-96, 351 F. 2d 956, 966-67 (1965); *Air Terminal Services, Inc.* v. *United States*, 165 Ct. Cl. 525, 534-36, 330 F. 2d 974, 979-80, *cert. denied*, 379 U.S. 829 (1964); *Anthony P. Miller, Inc.* v. *United States*, 161 Ct. Cl. 455, 471-73, *cert. denied*, 375 U.S. 879 (1963). In *Horowitz* the New York Ordnance Salvage Board had promised to ship silk purchased by the claimant promptly by freight, but was held to be excused from that duty because of an embargo placed on silk shipments by freight by the United States Railroad Administration. Here, we have a kind of converse of the *Horowitz* situation: the United States is not seeking excuse for its non-performance of contractual duties because of its sovereign acts; instead, the contractor is claiming that the sovereign acts of the United States—in providing judicial relief against itself, appropriating money to pay its liability, and paying the judgment—themselves breached the contractual obligation under the equal-treatment clause. As in *Horowitz*, it is fitting to refuse to read that provision so broadly as to intermingle these separate functions of government.

Our conclusions are, therefore, that plaintiff Reynolds is necessarily suing upon a claim for breach of contract which is barred by limitations, and that the most favored nation clause of Reynolds' contract does not give it a new or independent claim simply because Kaiser (which did not wait for the time-bar to fall) sought and obtained a judgment in this court. If Reynolds insists that the favored-nation provision must nevertheless be taken as the foundation for its suit, then it has failed to state a claim upon which relief can be granted.

The defendant's motion for summary judgment is granted and the petition is dismissed.

COLLINS, *Judge*, dissenting:

It seems to me that the crux of the court's opinion is that Reynolds' most favored nation agreement with the Government was not breached by the more favorable treatment accorded Kaiser because Kaiser's more favorable treatment was brought about by a decision of this court and not by the independent action of the GSA. This narrow construction of such an extraordinary agreement appears to me to be inconsistent with this court's opinion in *Kaiser I*[1] as well as with the spirit of the agreement itself.

In *Kaiser I*, this court held that the most favored nation agreement between the Government and Kaiser guaranteed equality of interpretation of contract terms. Without this guarantee, the court reasoned, "reliance upon the right [to uniform terminology] would be an empty exercise." 181 Ct. Cl. at 926, 388 F. 2d at 331. By the same token, since matters of contract interpretation, at times, may not be finally resolved without litigation, a guarantee of equality of interpretation is seriously eroded when it is confined to interpretation emanating from the GSA.

Fully stated, *Kaiser I* stands for the proposition that the most favored nation agreement here under consideration guaranteed to the contractors "equality of treatment." Moreover, this proposition, in my opinion, accurately reflects the spirit of the agreement. Before the various aluminum producers involved in the Government's Korean emergency program entered into their separate supply contracts, they demanded assurance that none would get more favored treatment than another. Each producer wanted a guarantee that its competitive position in the aluminum market would not suffer through more favorable treatment being extended to one or more of its competitors under the contracts. This reasonable expectation was ac-

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[1] *Kaiser Alum. & Chem. Corp.* v. *United States*, 181 Ct. Cl. 902, 388 F. 2d 317 (1967).

commodated, presumably, by the most favored nation agreement.

Properly interpreted, the agreement guaranteed equality of treatment under the contract. This meant that any time one of the contractors received a benefit under its contract owing to an interpretation of the contract, regardless of the origin of the benefit, which was not extended to another contractor, the latter's most favored nation agreement was breached.

I regard as specious the court's reasoning that Reynolds' most favored nation agreement was somehow inoperative because the funds used to pay the *Kaiser I* judgment were specially appropriated by Congress and actually paid by the General Accounting Office, an arm of the Congress. If the Kaiser dispute had been settled without litigation, the amount of the settlement would have then been paid by the GSA out of GSA funds. I can see no reason for negating the force of Reynolds' most favored nation agreement merely because Kaiser's dispute over contract interpretation was not settled prior to litigation.

While Reynolds' claim for breach of the substantive terms of its contract unquestionably accrued more than 6 years prior to the filing of this suit, Reynolds' present claim is not predicated on a breach of those substantive terms, but on a breach of the Government's obligation of equal treatment. This breach could not possibly have occurred prior to the 1967 decision in *Kaiser I*, well within the 6-year period preceding the filing of this suit. Reynolds' claim for breach of its most favored nation agreement, therefore, accrued within 6 years of the filing of this suit.

I would deny defendant's motion.

IN THE UNITED STATES COURT OF CLAIMS

No. 49-63

(Decided December 15, 1967)

KAISER ALUMINUM & CHEMICAL CORPORATION

v.

THE UNITED STATES

Max Thelen, Jr., attorney of record, for plaintiff. *Robert Gordon Sproul, Jr.*, and *Thelen, Marrin, Johnson & Bridges*, of counsel.

Frances L. Nunn, with whom was *Acting Assistant Attorney General Carl Eardley*, for the defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLAS, *Judges*.

OPINION

PER CURIAM: This case was referred to Trial Commissioner Roald A. Hogenson with directions to make findings of fact and recommendation for conclusions of law. The commissioner has done so in an opinion and report filed on November 21, 1966. Plaintiff filed exceptions to the commissioner's findings and the defendant filed exceptions to the commissioner's findings and recommended conclusion of law. The case has been submitted to the court on oral argument of counsel and the briefs of the parties.

The defendant now stresses one argument with which the commissioner did not treat, *i.e.*, that plaintiff is guilty of laches in waiting until 1963 to file this suit and should therefore be barred from all recovery. (It is admitted that the suit is not foreclosed by limitations.) The main answer is that this court has not accepted the defense of laches as applying to contract actions against the Government; that defense has been confined to personnel suits for unlawful removal, suspension, or demotion from a federal

position, and the court has given special reasons for its application to that area. See, *e.g.*, *Henry* v. *United States*, 139 Ct. Cl. 362, 366-370, 153 F. Supp. 285 (1957); *Bovard* v. *United States*, 160 Ct. Cl. 619, 620-22 (1963), *cert. denied*, 374 U.S. 830; *Alpert* v. *United States*, 161 Ct. Cl. 810, 820-21 (1963). So far as the court is aware, no case in this court has applied the doctrine as a defense to a contract action. *B-W Construction Co.* v. *United States*, 100 Ct. Cl. 227, 236 (1943), on which defendant relies, merely said that the long unexplained delay in bringing suit in that instance cast upon that plaintiff "a somewhat heavier burden in proving its case than usual." That was an evidentiary ruling, not an invocation of laches as such. We see no reason, now for the first time, to carry over laches as such to the contract field, and, as an evidentiary matter, we are not persuaded that the defendant's ability to make its case was materially harmed by the lapse of time before this action was begun.

Since the court agrees with the commissioner's findings, opinion, and recommended conclusion of law, as hereinafter set forth, it hereby adopts the same, as supplemented by the preceding paragraph, as the basis for its judgment in this case. Plaintiff is, therefore, entitled to recover and judgment is entered for plaintiff in the sum of $7,198,655.55, with defendant's counterclaims and plaintiff's reply thereto dismissed.

OPINION OF COMMISSIONER*

HOGENSON, *Commissioner:* This is a suit for breach of four contracts, in which it is claimed by plaintiff, Kaiser Aluminum & Chemical Corporation (hereinafter Kaiser), that defendant unilaterally terminated its market guaranty commitments prior to plaintiff's completed contract performance. Two theories of recovery are presented. One is based upon contract terms, the other upon a so-called

* The opinion, findings of fact and recommended conclusion of law are submitted under the order of reference and Rule 57(a).

"most favored nation" right. In question are four contracts, essentially identical, each providing in substance for the private financing, construction and operation, by Kaiser, of aluminum reduction facilities (hereinafter the "additional facilities"), and for the production, at said facilities, of specified quantities of primary aluminum pig.[1] In exchange for these commitments, defendant undertook to guarantee the disposition, by purchase, of that portion of Kaiser's contract production in the additional facilities, which Kaiser would be unable to sell to others or utilize for its own fabricating purposes.

The parties have by formal stipulation withdrawn defendant's counterclaim and contingent counterclaim and plaintiff's claim for affirmative relief contained in its reply to such counterclaims, agreeing that such withdrawal constitutes a full release of the matters set forth in such counterclaims and reply thereto, which pertain to transportation costs of aluminum purchased under the supply contracts, and defendant's counterclaims and plaintiff's reply thereto should be dismissed.

The contracts involved were executed in behalf of defendant by the General Services Administration (hereinafter GSA), acting under the authority of the Defense Production Act of 1950, 64 Stat. 798 (1950), 50 U.S.C. App. §§ 2061-2166 (1952), as implemented by Executive Order. In addition to Kaiser's contracts, defendant also entered into like agreements with the Reynolds Metals Company (hereinafter Reynolds) and the Aluminum Company of America

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[1] The term "pig" denotes the initial product of an aluminum reduction plant as contrasted with "ingot" or "billet" which has been subjected to further processing and purification. The term "primary" denotes new or virgin metal, obtained directly from the electrolytic reduction of alumina, as contrasted to "secondary" which indicates a remelting of scrap. Hence "primary aluminum pig" is the basic product which is derived directly from alumina in turn derived from bauxite.

(hereinafter Alcoa). These agreements, collectively designated as the aluminum expansion program, resulted from administrative implementation of the statutory purpose to meet the nation's heightened need for an expanded production of strategic materials during the Korean War emergency.

The contracts in question are the following:

(1) GS-OOP(D)—12006 dated as of December 19, 1950, calling for the production of 1 billion pounds of primary aluminum pig at reduction facilities to be constructed by Kaiser at Chalmette, Louisiana (hereinafter Chalmette I contract).

(2) GS-OOP(D)—12213 dated as of October 31, 1951, calling for the production of 200 million pounds of primary aluminum pig at reduction facilities to be constructed by Kaiser at Mead, Washington (hereinafter Mead contract).

(3) GS-OOP(D)—12143 dated as of November 6, 1951, and calling for the production of 1 billion pounds of primary aluminum pig at reduction facilities to be constructed by Kaiser at Chalmette, Louisiana (hereinafter Chalmette II contract).

(4) GS-OOP(D)—12192 dated as of February 28, 1952, and calling for the production of 82 million pounds of primary aluminum pig at additional reduction facilities to be constructed by Kaiser at Tacoma, Washington (hereinafter Tacoma contract).

Under its four supply contracts, Kaiser was obligated to produce 2 billion 282 million pounds of primary aluminum pig, and the ultimate question at issue here is whether this amount of production was achieved, as defendant claims, or whether, as Kaiser contends, completed performance demands the production of an additional 84,407,143 pounds. The controversy arises because the parties disagree as to

the standard to be used in measuring production prior to April 1, 1957.[2]

Kaiser's basic premise is that Article I of the contracts clearly establishes both the quality and the quantity of the aluminum to be produced; hence, the computation of production prior to April 1, 1957, must be determined in accordance with Article I, which reads in pertinent part as follows:[3]

> Subject to the terms and conditions hereof, Contractor agrees to produce and to sell Five Hundred Thousand (500,000) short tons of 2,000 pounds each, of primary aluminum pig, said primary aluminum to be of minimum grade of ninety-nine percent (99%) aluminum, which primary aluminum is herein called the "additional production." The Contractor will produce such aluminum from facilities which the contractor agrees hereafter to construct, herein called the "additional facilities." * * *

Kaiser interprets the foregoing to mean that contract production should be (a) limited to metal having a minimum purity of 99 percent or higher, excluding offgrade aluminum, and (b) that the weight of such minimum purity metal should be computed solely on the basis of net aluminum, consequently excluding the weight of any other metals added to make alloys, such added metals being hereinafter called alloys. (This basis of measurement shall be referred to as the "net basis.")

Pursuant to Kaiser's position, the weight of all metallic alloy additions (whether introduced in the melting pots dur-

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[2] On September 13, 1957, the Kaiser contracts were amended, as hereinafter related. Paragraph 8 of the amendment provided a standard for the computation of production but this standard was given limited applicability in that its operation was prospective only, *i.e.*, to govern only after the date of March 31, 1957.

[3] Inasmuch as the contracts in question are identical in their relevant provisions, the references shall be to the Chalmette I contract.

ing the production of primary pig, or subsequently in the holding furnaces during the production of ingots and billets) plus the weight of all "off-grade" (primary pig having a purity of less than 99 percent) would be excluded. As stipulated, the combined weight of such exclusions allocable to production prior to April 1, 1957, is 84,407,143 pounds. Hence, the application of Kaiser's method of computation would reduce the amount of contract metal actually produced prior to April 1, 1957, which in turn would result in an extension of the contract performance beyond the the date at which defendant claims full contract production had been achieved. The significance of the extension lies in the fact that Article III(c) of the contract comprehended a Government guaranty obligation coextensive with Kaiser's production obligation.

Article III(c) reads in part as follows:

> Any quantity of additional production from the additional facilities not disposed of in accordance with this Article III, and not otherwise sold or utilized by Contractor, may be tendered to the Government in the form of pig only * * *.

Given a situation in which aluminum is in long supply (which was the case in 1958 when defendant claimed the contracts had come to an end), the contractor could rely upon his Article III(c) right and "put" metal to the Government. In the case at bar Kaiser claims it had the right to "put" the additional 84,407,143 pounds on the net basis of computation of contract production, applicable to the period prior to April 1, 1957.

Resisting what it regards as a unilateral attempt on the part of Kaiser to redefine the meaning of contract production, defendant argues, among other things, that the Kaiser contract amendment, executed on September 13, 1957, was negotiated on a basis which fixed the amount of contract production remaining after the date (thereby necessarily establishing the amount of production beforehand). Fur-

ther, defendant contends that Article I of the contracts, from which Kaiser derives its "net basis" argument and which it claims represented the standard for computing production *prior* to April 1, 1957, is an ambiguous term, one which received a different interpretation by each contractor. Moreover, defendant argues that it accepted the basis of measurement under which each contractor chose to operate (i.e., the interpretation which each gave to the meaning of Article I production) and therefore Kaiser should not now be permitted to abandon its previously elected standard.

Thus, it is defendant's position that the weight of *all* aluminum produced at the contract facilities prior to April 1, 1957, regardless of purity, including the weight of *all alloys* added in the reduction process (melting pots) and in the holding furnaces, should be included and attributed to the cumulative amount of contract production achieved prior to the effective date of the amendment. (This basis of measurement shall be referred to as the "gross basis.")

Inquiry must begin with the basic issue, that is, whether the definition of "additional production" as contained in Article I, provides a clear, unambiguous standard on the basis of which contract production prior to April 1, 1957, must be measured.

Considered only from the standpoint of its own terms, Article I would seem quite clearly to require exclusion of all alloys, since, by definition, it called for the production of primary aluminum pig specified only in terms of a minimum purity content, and no mention is made of alloys (other metals) to be added in the operation of the additional facilities. Yet the negotiations which followed after the execution of the supply contracts, and the complexities and practices of the industry, dispel any certainty which the casual reader might be led to assume from the language alone, and they provide ample proof that Article I's definition of "additional production" falls far short of pos-

sessing the clarity which Kaiser now seeks to attribute to it.

The history of the Kaiser supply contracts (and those of Alcoa and Reynolds) shows that the onset of performance brought with it questions of contract interpretation which remained the subject of negotiations for several years up to the time of the contract amendment executed between Kaiser and defendant on September 13, 1957, similar amendments being made to the Alcoa and Reynolds contracts at about the same time. Though the parties treated these issues in terms of separately identifiable questions (as indeed they were) the common element to many of the principal questions was the recognized necessity for the development of a uniform accounting system under which each contractor would report his production to defendant on the same basis.

Of the several questions involved, those bearing most directly upon the issue here concern the so-called "put accounting" and the "nonintegrated user" problems.[4] Both,

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[4] Another problem was that of metal substitution. Due to the fact that the aluminum supply program had been implemented in many cases through the expansion of existing facilities, physical intermingling of metal from noncontract and contract sources could not be avoided. Since the supply contracts permitted a contractor, in making deliveries under the contract, to substitute noncontract metal for contract metal, it was unanimously recognized that some means of control would have to be instituted in order to insure that the quantity of aluminum called for under the contracts was in fact being produced. All conceded that the maintenance of separate physical inventories was to be avoided and that an accounting approach to the problem of verifying contract production was indicated.

Yet another problem (called the Alcan issue) involved the aluminum producers' historic practice of purchasing aluminum from outside sources. This subject was never discussed during the negotiations leading up to the aluminum supply contracts, and when both Alcoa and Kaiser subsequently entered into long-term purchase agreements with the Aluminum Company of Canada, defendant became concerned over the possibility that it might, in an over-

as already noted, concerned the development of a suitable accounting system, yet each related to essentially different aspects of the supply contracts. The put accounting problem was concerned with the development of an accounting system by means of which it would be possible for defendant to verify the correctness of the amount of contract production which a supplier might seek to "put" to defendant. The nonintegrated user issue was directed toward insuring (again by an accounting means) the contractor's full performance of its obligation to offer a stated percentage of its contract production to those aluminum fabricators whose plant facilities did not include the capability of manufacturing aluminum—either in pig or ingot form.[5]

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supplied market, be compelled to absorb a greater percentage of contract production via the put rights, than would have been the case absent the inflow of the additional Canadian metal. Hence, defendant took the position that accommodation of metal purchases should be reflected in a downward adjustment of potential put rights.

[5] In addition to defendant's desire to obtain metal for its own consumption as well as for stockpile purposes, defendant was also keenly interested in assuring that those aluminum fabricators who lacked the capacity to produce the basic metal nevertheless receive or have been made available to them a percentage of the metal which was being produced. This obligation found expression in Article III(b)(1) which reads in pertinent part as follows:

(b)(1) For each consecutive six-month period referred to in subparagraph (a) above, Contractor shall offer in pig or ingot for sale to non-integrated users, at the price provided in ARTICLE XI hereof, the quantity, if any, by which the amount ordered by the Government for such six-month period, in accordance with subparagraph (a), is less than two-thirds of the reasonably estimated additional production for such period. (As used in this agreement, the term "nonintegrated user" shall mean any manufacturer, fabricator, finisher or producer in the United States who is not a producer of primary aluminum or an affiliate or subsidiary of such a producer, and who is purchasing such aluminum for his own manufacturing, fabricating, finishing or producing operations.)

• • •

(Under the contract such fabricators were termed nonintegrated users.)

Examination of the documents which treat these two questions reflect a common denominator, that being, the need to achieve unanimity on a definition for the term "additional production." And then, as now, the question was whether production should be defined so as to include the weight of alloys introduced during the reduction process or in the holding furnaces, or whether production should be considered strictly in terms of the net aluminum content of each pig or ingot. Indeed, neither party disputes the fact that the matter of gross basis versus net basis was a subject of frequent discussion, but the important qualification which Kaiser now asserts is that these discussions were aimed at attaining a satisfactory definition for the purpose of *reporting* production and not for the purpose of developing a standard by which *to compute* production. To buttress this contention, Kaiser argues that the matter of computing production was never in issue and therefore the subject was never discussed until its introduction on September 13, 1957, this being the final day of negotiations and the day upon which the Kaiser contract amendment was executed.

This contention cannot be accepted. It is true enough that the negotiations were concerned with resolving the definition of "additional production" for reporting purposes, but it is unmistakably clear that the matter of how production under the contracts should be computed was also a subject with which Kaiser and defendant were frequently concerned, as well as the other industry members.

The scope of ambiguity inherent in Article I's use of the term "additional production" was recognized at an early date, and still existed as late as June 6, 1956, when Kaiser submitted a memorandum to the defendant setting forth the issues which had been under discussion between industry and Government representatives over the prior 2

years. One of the two major questions which the memorandum recognized as demanding resolution concerned:

> (b) The proper accounting methods to be used for purposes of calculating the quantity produced under the contracts, the quantity which the contracts require be offered to non-integrated users, and the quantity, if any, which the contractor is entitled to "put" to the Government.

The attached appendix to this memorandum contained a more detailed analysis of the specific issues contained within the basic problems. With respect to the problem quoted above, the memorandum contained the following:

> (3) It has been obvious to the parties for some time that it is in the mutual interest of all concerned to develop and agree on a uniform method of accounting for metal produced at the contract facilities. A uniform method is needed to determine how much of the contract tonnage has been produced from year to year, to determine what quantity the contractor is obligated to offer to non-integrated users and whether this obligation has been performed, and to determine the quantity each contractor may "put" to the Government. If a uniform system is not adopted, each contractor can in good faith arrive at a method of accounting which differs from the methods used by the other contractors, and which may contain features unsatisfactory to the Government. This would lead to innumerable disputes when the Government audits the performance of the contractors, and would make it difficult for the contractors to make day to day operating decisions because of uncertainty as to the proper interpretation of the contract provisions.
>
> (4) The following unsettled questions illustrate the importance of arriving at a uniform accounting method:
>
> (a) The contract production must consist of pig and ingot containing not less than 99% aluminum. The pig and ingot produced at the contract facilities varies widely in aluminum content from 99% up or down, depending on the alloy requirements of the

customer. Should computations of production, for purposes of calculating the quantity offered and sold to the Government and nonintegrated users and the quantity to be "put" to the Government, include the alloy materials added in the reduction pot or after the ~~metal is~~ poured from the reduction pot, or should such computations be based solely on the aluminum content of each pig or ingot?

* * * * *

The foregoing adequately outlines the present problems, and the failure to have totally met such problems has led to the present suit—the very dispute anticipated in 1956. But more importantly this document suggests a clear awareness on Kaiser's part that the significance of the problems inherent in defining production (which was a key factor in the numerous discussions that dealt with the question of establishing a uniform accounting system) extended well beyond the limited sphere of reaching an accord merely for the purpose of achieving uniformity in reporting sales and metal utilization.

This document thus stands as a clear admission by Kaiser that the contract production of primary aluminum pig, otherwise designated as the "additional production," not only lacked precision but also that a uniform method of computing contract production specifically required its resolution. Accordingly, Kaiser's present contention respecting the clarity of Article I as a standard of computation must be rejected.[6] But the matter does not end there.

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[6] Further proof of this conclusion is revealed in the various approaches that Kaiser submitted with respect to the problem of defining the term "additional production." The record discloses that Kaiser consistently recommended that production—for purposes of showing metal disposition (sales and utilization) be reported in terms of the total weight of *all* metal but that for purposes of computing actual production it did not adhere to any fixed concept.

Initially it recommended that production be computed in terms of potroom weights (net aluminum weight plus the weight of alloys added in the melting pot but excluding all alloys added

Events assumed their predicted course with each contractor reporting production pursuant to a different basis of computation. In this connection it should be pointed out that reporting of production was likewise a matter upon which the contracts were silent; hence, the procedure which any given contractor might choose was entirely within his discretion, yet ultimately subject to final Government approval.

Aware that each of the producers had temporarily accommodated the problem of measuring production on an individual basis, defendant offered the following proposal at the Government-Industry meeting which was held on June 27, 1956:[7]

> That only the primary aluminum produced from the contract additional facilities and meeting minimum

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thereafter). When it was suggested that both metal disposition and metal production be reported on a potroom weight basis, Kaiser changed its position. Thereafter it suggested (as before) that metal disposition be reported in terms of total weight, but that "for purposes of computing the total quantity of additional facility production covered by the supply contracts all alloy shall be excluded."

Kaiser strongly urges its recommendation to compute production on a net basis as proof of the fact that the matter was always so understood. This is only if one ignores all prior deliberations on the subject, but once placed in context, it becomes in reality what Kaiser then regarded it as, namely, a proposal only. Add to this Kaiser's earlier views on the subject of computing production and it becomes abundantly clear that the interrelationship between alloy treatment and the computation of production was indeed a recognized ambiguity.

[7] The report of this meeting indicates the following different approaches taken by the three producers:

(a) Alcoa reported its production on a gross pot basis including alloys less scrap (both for production and sales reports).

(b) Kaiser reported gross pot production including alloys plus net holding furnace additions (metallic additions introduced in ingot production) for both its production and sales figures.

(c) Reynolds excluded alloys added in the melting pots for both production and sales figures.

specifications (99% purity) be considered as production within the meaning of the contracts.

Both Kaiser and Alcoa indicated a willingness to accept this definition and to recompute their prior production accordingly. However, for reasons not disclosed in the record, no final agreement was concluded.

The state of uncertainty regarding the proper basis for computing production continued unresolved. Indeed, resolution was not required until market conditions reached the point that production at the additional facilities could not be disposed of by Kaiser by its own use or by sale to purchasers other than defendant. In December 1956, Kaiser made its first "put" to the Government, and the need for resolution became intensified. In the months that followed Kaiser was forced to put to the Government additional amounts of its undisposable production excess, but it was mutually understood that the Government's acceptance of such tenders was conditioned upon the reaching of an agreement which would apply to the unresolved aspects of the contracts, including *inter alia* methods of computing and reporting production.

Though extensive negotiations between the Government and the individual suppliers (conducted separately with each supplier) commenced in June 1957, a final agreement was not reached with Kaiser until September 13, 1957, when an amendment to Kaiser's contracts was executed. Moreover, it was not until this final date that paragraph 8 of the amendment was proposed by the Government.

Paragraph 8 of such amendment, as adopted, reads as follows:

8. Computation of Production

After March 31, 1957, in computing and reporting production to the Government, production will be pot room weights including metallic additions.

As proposed by defendant, this language did not contain the phrase "After March 31, 1957," which was added at the insistence of Kaiser.

There is no dispute between the parties either as to the meaning of, or the applicability of, the provision for contract production after March 31, 1957. Both concur that as a standard for measuring such production, paragraph 8 requires that the weight of all metal (regardless of purity) plus the weight of all alloys added in the melting pots, count towards fulfillment of the contract tonnage. This standard does not, however, call for the inclusion of any alloys added in the holding furnaces. It is clear that this paragraph was meant to have prospective application only, i.e., effective after March 31, 1957, and therefore it may not be viewed as providing a retroactive resolution to a long-standing dispute. Hence the ultimate question remains—how should production prior to this date be computed?

The defendant argues that since Article I was ambiguous, it was open to Kaiser to adopt a means of computation consistent with its own interpretation and that the basis thus chosen subsequently received implicit acceptance by the Government. This acceptance is alleged to derive from the fact that during the final series of negotiations (conducted from June through September 1957), Kaiser, in the context of discussions seeking a compromise and settlement of the so-called Alcan issue (see n. 4, *supra*), represented its remaining contract production on the same basis that it had consistently employed in reporting production (i.e., a gross basis which included the weight of all metal regardless of purity plus the weight of all alloys added in the reduction pots and in the holding furnaces, see n. 7(b), *supra*) and that this basis, though not expressly so stated, was impliedly incorporated into the amendment of September 13, 1957, as finally executed. Additionally, the defendant points out that the previous

basis of computing production likewise appears in paragraph 5 (quoted *infra*) of the amendment in the sense that it was employed in the calculation of the 78 million pounds specified in said paragraph. The argument, in short, is that Kaiser may not now reject the amendment's underlying fundamental implied premise, hence it may not demand the retroactive application of a net basis standard.

There are two aspects to be considered regarding the defendant's position on the contract amendment. Both present a common element, that is, they both concern the negotiations whose principal object was to limit the defendant's "put exposure." But paragraph 5 of the amendment deals with metal the defendant *has accepted,* whereas the Alcan issue (which was resolved by decreasing Kaiser's put right in an amount equal to its metal purchases) deals with metal the defendant *may be* asked to accept. This difference compels separate analysis.

Paragraph 5 of the contract amendment states:

> With respect to the production year ending March 31, 1957 you have tendered to the Government, and the Government has accepted, 78,000,000 pounds of primary aluminum. The acceptance of that amount of primary aluminum is hereby ratified and constitutes a complete fulfillment of the Government's obligation to accept tenders of primary aluminum pig for such year.

From this, the defendant derives the argument that the 78 million pounds were impliedly computed in accordance with the gross basis, that such basis cannot now be changed, and Kaiser cannot recompute the prior production to which the amount specified relates.

This contention cannot be accepted. No substantial proof has been introduced to support the assertion that a gross basis standard was relied upon in fixing the 78 million pounds specified in paragraph 5. Furthermore, it is diffi-

cult to see any logical connection between the present issue and the amount of metal defendant accepted for the production year ending March 31, 1957. Had this tender (the 78 million) contained alloys, then one could see merit in defendant's present argument, since, in such a situation, specifying a total weight, by incorporating alloy weights, would seem to produce the finality for which defendant now argues. But such is not the situation here. The weight of the 78 million pounds of unalloyed pig represents nothing more than undisposable production excess. Whether Kaiser adhered to a net or a gross basis in computing its production would not reduce the weight of its production excess by one iota, and unless that excess incorporated a standard (i.e. included alloys which Kaiser either included or excluded in ascertaining total weight) it bears no relation to the question at issue in this case. Defendant does not assert (nor is it evident) that it accepted alloyed pig, and it cannot be concluded that what defendant accepted was computed on a gross basis.

Regarding defendant's Alcan argument, it is defendant's contention that during the June-September 1957 negotiations, Kaiser represented its remaining production at 503.4 million pounds, that this was computed on a gross basis, and that this would in fact have been the approximate amount of production remaining if prior *reported* production were taken as the equivalent of actual *contract* production. Here, as in the case of paragraph 5, the defendant falls back upon an "incorporation" argument, contending specifically that the Alcan solution was predicated upon the assumption that the gross basis standard, as reflected in Kaiser's reported production, and from which it allegedly derived its remaining production figure, must likewise be the standard governing the amount of prior production. If a recomputation were permitted, the argument continues, then the remaining production figure would likewise be affected.

However, the record does not support the claim that Kaiser represented its remaining production at 503.4 million pounds but rather an amount of approximately 544.1 million pounds. The record strongly suggests that the defendant obtained its figure simply by deducting the amount of prior reported production from the total contract tonnage, and that only in that sense (through its records) did Kaiser, in fact, make a "representation."

Aside from the inaccuracy as to the basic fact, the more fundamental objection to the defendant's argument is its assumption that Kaiser's reported production was the equivalent of contract production computed on the basis of a gross standard. Such was never the case and therein lies the heart of the matter. By equating the two, as the defendant now does, it reveals its basic misconception in regard to the scope of the gross basis standard. The record offers abundant proof of the fact that Kaiser always regarded the matter of reporting production as a subject distinct from the matter of computing production (for contract purposes). Virtually every proposal submitted by Kaiser, reflects this dual approach, and under it, *regardless of the standards advocated,* reported production always exceeded "contract" production. The difference is attributable to the fact that for reporting purposes, Kaiser included the sum total of *all* production. In other words, the reporting technique was on the basis of total weight of finished products including the weight of all offgrade aluminum shipped as such. However, for computing purposes Kaiser was concerned strictly with the weight of the contract product, i.e., primary aluminum pig or ingot. And in regard to the latter, the constant question was whether contract production should be computed according to the net weight of the aluminum or whether it should also include alloy weights as well. At no point during the years in which the questions of defining the term "additional production" was under discussion, did Kaiser ever advance the proposition

that computed production (as distinguished from reported production) should also include offgrade metal. In effect, the terms "gross" or "net" meant one thing when applied to reported production, and another when applied to computed production. Indeed it was the defendant's desire to achieve uniformity between the two, but it may not use that aim now to enlarge the ambit of ambiguity involved in the question of how production should be *computed.* As to this, the question always was: Should the alloys in the reduction pots or in the holding furnaces count towards the total contract tonnage? There is no room in that question, or for that matter, in the contract language itself, to sustain the defendant's present position, to wit: that offgrade metal (which by definition refers to metal having a purity less than that called for under the contracts) should be included in the amount of contract metal produced through March 31, 1957.

It is clear that Kaiser never knowingly agreed to this, and it is similarly clear that if Kaiser's basis of computing production had been incorporated into the amendment as the defendant now argues (whether that basis included alloys or not) it would *not* result in the inclusion of the 61,117,911 pounds of unreblended offgrade attributable to Kaiser's performance through March 31, 1957.

From this, three conclusions follow: First, the defendant's argument that the Article I ambiguity was resolved through the incorporation in the contract amendment of Kaiser's method of computing production, *as reflected in its reported production,* must be rejected. The method of reporting production simply bears no relation to the method of computing contract production, regardless of the standard involved. The equation of the two was the result of the defendant's own assumptions about the matter, and not any obscurity which Kaiser deliberately fostered. Secondly, it seems clear that the

question of how production should be computed prior to April 1, 1957 (within the limits of the ambiguity which this opinion recognizes) was not resolved in the September 13, 1957, amendment because the parties deliberately made the standard prospective as to production after March 31, 1957, and no implied standard can be found for prior production. And finally, the ambiguity notwithstanding, there appears to be no basis for resisting Kaiser's clear right to exclude from "contract" production the weight of the offgrade metal that was included in its production reports, since this was never embraced within the scope of the Article I ambiguity. The contracts called for the production of primary aluminum pig and ingot having a minimum purity of 99 percent. The single question which this raised, and which remains unanswered, concerns the treatment of the alloys contained therein. Neither the contract, nor its amendment, provided any answer to this question.

The thought is inescapable that both Kaiser and the defendant entered into the final round of negotiations on the supposition that *all* matters would be settled, the defendant operating on the premise that reported production should be the equivalent of actual contract production, and Kaiser operating on the premise not only that its distinctions between reporting and computing production had been understood, but further, that the net basis of computation would govern the computation issue at least up to the cutoff date of March 31, 1957.[8] The legitimacy of this speculation is heightened when one considers the fact that paragraph 8 of the amendment which provides for a basis of computing production after March

[8] The legitimacy of this assumption derives from the fact that the defendant itself had proposed a net standard—at least for reporting purposes. Kaiser not only agreed to this, but further suggested that production also be computed on this basis. Kaiser proposed this dual net basis approach as a basis for final settlement as late as February 1957.

31, 1957, did not, as originally proposed by defendant, contain the limiting words, "after March 31, 1957." That Kaiser insisted upon, and that defendant acquiesced to, a limitation of this clause to the period *after* March 31, 1957, strongly reinforces the notion that each wanted to insure *the prospective* application of a new standard, thus preserving, what each supposed would be the controlling standard governing production *prior* to March 31, 1957. But neither of these opposing assumptions can now be molded into a judicial construction of contract language. They succeed only in proving the negative, and the ambiguity remains.

While there is a legion of judicial precedents, involving application of rules for resolution of ambiguities in contract language, in which the courts have strained to determine actual or presumed intent of the parties, or at least to determine what the parties were to be held to have intended under the facts and circumstances attendant to the execution of the contract, or from their conduct thereafter, it would seem that in this case (in the face of lack of definition in the contracts and consistent and reasonable disagreement of the parties) the requisite mutual intent—actual or presumed—cannot be found as a basis to determine what the agreement of the parties should be held to be regarding how contract production should be computed for the period prior to April 1, 1957, at least as it pertains to alloys added in the melting pots and holding furnaces. It is my opinion that the court should not undertake to write provisions into the contracts when the record fails to show what the parties actually intended, or even to furnish a basis for determining (by application of some rule of interpretation, implication or construction) what the parties must have intended or will be held to have intended as reasonable persons acting in good faith and with fair dealing. *Robbins* v. *Rollins*, 127 U.S. 622, 633 (1888); 3 *Corbin On Contracts, Interpretation*, § 541 (1960); 17 *Am. Jur. (2d), Contracts*, § 242

(1964). The contract terms and conditions were the joint work product of the negotiators for industry and the Government, and neither party can be said to be the drafter of the original contract language. See *WPC Enterprises, Inc.* v. *United States,* 163 Ct. Cl. 1, 323 F. 2d 874 (1963). No acceptable basis for resolution of the contract ambiguity has been advanced by either party.

However, Kaiser has presented an alternative theory of recovery, one founded upon its alleged right to so-called "most favored nation" treatment. This, it is claimed by Kaiser, clearly entitles it to recover in this case, even though it be assumed that the contracts are ambiguous.

At the time of initial negotiation of the aluminum supply contracts, it was indicated to the contractors that the defendant would follow a policy of uniformity of treatment in its dealings with various suppliers. This policy, expressed initially as a verbal commitment, became part of the defendant's contractual undertaking, and was subsequently confirmed by way of letter agreements. In fact, prior to the execution of the contracts, this oral commitment became a firm agreement between Kaiser and defendant due to the fact that Kaiser's lending institutions insisted that equal treatment be accorded to Kaiser under the industry contracts in order to maintain Kaiser in a competitive position.

Under the agreement, Kaiser had the right to compel the amendment of its own contracts to correspond with the terms of the contracts of its competitors (i.e. Alcoa and Reynolds). One letter confirming the agreement stated that "such amendments will be for the purpose of bringing your contract into conformity with agreements with such other companies." By way of limitation, the letter provided that "this commitment is limited to contracts relating to the proposed expansion of aluminum reduction capacity now being negotiated with your Company, Aluminum Company of America, and other companies * * * and

to not beyond thirty days following the submission to you of the last such contract." Kaiser does not contend that more favorable contract articles were accorded to its competitors. In fact, the supply contracts with Kaiser, Alcoa, and Reynolds were in substance alike, and Kaiser never requested inclusion of Alcoa or Reynolds terms within the 30 days allowed, nor at any time, except for a minor matter not here relevant.

Relying upon this commitment, Kaiser contends that its supply contracts, being essentially the same as the Reynolds supply contracts, must therefore receive as favorable an interpretation, and inasmuch as Reynolds' production prior to April 1, 1957, was computed on a net basis, Kaiser argues a right to similar treatment. Defendant's failure to permit Kaiser to change the basis upon which it had historically reported its production and to compute its contract production on a net basis, is therefore regarded as a breach of contract.

In computing its contract production for put accounting purposes for production prior to April 1, 1957, Reynolds eliminated all offgrade aluminum and all alloy metals added in the operation of its contract facilities, and defendant discharged its contract obligations to Reynolds accordingly. In view of this disparity of treatment between Kaiser and Reynolds, consideration must be given to the question as to whether there was a breach of defendant's promise to afford to Kaiser contract terms equal to those accorded to the other industry members. The basic validity of such an undertaking has previously been recognized by this court. *Kaiser Aluminum & Chemical Corp.* v. *United States,* 152 Ct. Cl. 641, 287 F. 2d 890 (1961), in which defendant undertook by letter agreement to give to Kaiser "corresponding treatment" received by Reynolds on sales by defendant of aluminum reduction plants, and not to offer the same type of plants to Reynolds "on a more favorable basis."

However, to arrive at Kaiser's conclusion that it is entitled to recover under the most favored nation right, one must first accept the view that the agreement granted a right to compel uniformity in interpretation, and if this be so, there remains the question as to whether the waiver which Kaiser executed in conjunction with the September 13, 1957, amendment effected a waiver of the very right now claimed.

Although the letter agreement does not expressly state that uniformity of interpretation would be accorded to like contract terms, one must accept this as its only reasonable meaning. Adherence to the defendant's argument that this agreement gave Kaiser nothing more than the right to have incorporated in its contracts what appeared to be a more favorable contract provision accorded to Alcoa or Reynolds, without the subsequent right to obtain equality in the interpretation of said provision, would reduce the agreement to a mere illusion. Under such circumstances reliance upon the right would be an empty exercise. Defendant did provide the three industry members with equivalent contract terms, but it is implicit in the most favored nation agreement that equality of treatment would not be destroyed by according different interpretations of the same contract provision to the three competitors. (*Cf. Crown Coat Front Co.* v. *United States,* 154 Ct. Cl. 613, 616, 292 F. 2d 290, 292 (1961), in which the court sustained by implication the Government's right under a supply contract to test an article for required chemical content, even though no such test was provided under the testing clauses of the contract, because otherwise the chemical requirement would be meaningless.) Defendant's further argument must be rejected that the agreement was restricted to a 30-day period. This limitation narrowed the time-frame during which Kaiser could request the adoption of a provision contained in either Alcoa or Reynolds contracts but it cannot reasonably be held to effect a corresponding restriction with respect to

the defendant's fundamental obligation to insure uniformity in the administration of like provisions. The conclusion in this regard is reinforced by the fact that defendant requested a waiver of Kaiser's "most favored nation" right during the course of the 1957 negotiations—6 years after the right had initially been granted. Surely this is a clear acknowledgement that the agreement provided Kaiser with a right whose efficacy was not limited to a period of 30 days.

These considerations notwithstanding, defendant contends that whatever right Kaiser might have had in regard to equality of treatment, Kaiser waived that right. During the June-September 1957 conferences between Kaiser and defendant, while the separate conferences with Alcoa and Reynolds were being held, defendant requested Kaiser to provide a waiver of the most favored nation commitment. Under date of September 20, 1957, Kaiser supplied defendant with a letter, referring to the September 13, 1957, amendment to the four Kaiser contracts, and to the defendant's letters which had confirmed the most favored nation agreement, and stating further:

> Kaiser Aluminum & Chemical Corporation hereby waives its rights to "most favored nation" treatment under the letters of November 27, 1950, and September 29, 1951, with respect to any agreements amending the above-captioned contracts which you have entered into or are about to enter into with Aluminum Company of America or Reynolds Metals Company, to the extent that such amendments cover the same subjects covered in the agreement amending the above-captioned contracts with Kaiser Aluminum & Chemical Corporation entered into between us on September 13, 1957.

The amendment to the Reynolds contracts (September 16, 1957) covered essentially the same subject matters and compromises achieved in the Kaiser amendment, and it must be concluded from the preferential treatment received

by Reynolds, that neither Reynolds nor defendant intended to define contract production prior to April 1, 1957, other than on the net basis. The record fails to show that any modification was made in the Alcoa amendment concerning computation of contract production prior to April 1, 1957. Since there is no substantial evidence indicating a contrary meaning, the plain language of Kaiser's waiver letter must be accorded its apparent meaning, i.e., that the only waiver of its "most favored nation" right was as to the September 1957 amendments of the Alcoa and Reynolds contracts "to the extent that such amendments cover the same subjects" covered in the Kaiser amendment. Thus, it must be concluded that by its September 20, 1957, letter, Kaiser did not waive its "most favored nation" right to compute contract production prior to April 1, 1957, in the same way Reynolds was permitted to do, because the only definition of contract production contained in the September 1957 amendments of the contracts of the various industry members pertained only to production after March 31, 1957.

Plaintiff's petition seeks recovery of $7,563,000 for the alleged breach of contracts. By stipulation of the parties filed herein and included in the trial commissioner's memorandum of pretrial conference, the parties agreed (subject to the limitations stated in paragraphs 7 and 8 of the stipulation) that on the basis that plaintiff is entitled to recover on the offgrade and/or alloy issues, then the court shall enter judgment for plaintiff in the amounts set forth in paragraph 4(a) and/or paragraph 4(b) of such stipulation, which provide as follows:

> 4. (a) The offgrade issue involves 61,117,911 pounds of aluminum, and damages shall be assessed at the rate of $.0823519 per pound or a total of $5,033,178.
>
> (b) The alloy issue involves alloys added to the reduction cells or pots in the amount of 6,445,079 pounds, and alloys added in the furnaces in the amount of 16,844,153 pounds, and damages shall be assessed at

the rate of $.0823519 per pound or a total of $1,917,912.50.

The above-mentioned limitations to such stipulations are contained in paragraphs 7 and 8 of the stipulation, as follows:

> 7. It is defendant's contention that if the court should find that plaintiff, as a matter of law, is entitled to recover damages, the damages claimed are excessive and that damages should be limited on the theory and in the amount set forth in paragraph III(b), page 17, of Defendant's Response to Plaintiff's Submission Pursuant to the Order of the Commissioner Dated September 4, 1963. If the court finds, as a matter of law, that this alternative theory of damages has been established, then the court shall enter judgment for the amount of $1,450,618 [amended during the trial to $1,423,165.58] on the alloy and offgrade claims, or a proportionately smaller amount if the court should find in favor of plaintiff on only a part of its total alloy or offgrade claim.
>
> 8. In paragraph III(c) of Defendant's Response to Plaintiff's Submission Pursuant to the Order of Commissioner Dated September 4, 1963, relating to "precompletion" aluminum production, pages 17-18, defendant raises a defense on damages. The number of pounds of pre-completion aluminum production is set forth in Schedule L, appearing at page 18 of Defendant's Response Pursuant to Rule 43(d)(2) to plaintiff's Statement of Items and Figures Intended to be Proved. Plaintiff agrees that the figures are correct, but denies that defendant is entitled to offset all or any part of said pre-completion production against the offgrade or alloy claim. If the court finds, as a matter of law, that this defense is valid, then its effect is to reduce or offset plaintiff's alloy and offgrade claims in whole or in part so that plaintiff will be entitled (a) to no recovery, and judgment may be so entered; or (b) to a judgment in an amount less than its full alloy and offgrade claim, if the court should find, as a matter of law, that only part of this pre-completion tonnage should be offset.

The referenced paragraphs of defendant's pretrial submission state as follows:

> III. Damages. * * *
>
> b. Even if the above were not true, plaintiff could not claim that it had been damaged to the full amount of the 86,035,297 pounds. By the contracts defendant guaranteed a market, it did not guarantee to absorb *all* production—only that not otherwise disposed of. Plaintiff's records show that only 20.474% of this production would have been delivered to the Government. Thus plaintiff's claim for lost profit ($7,085,173) should be reduced by 79.526% ($5,634,555) leaving the maximum amount of the claim at $1,450,618. But before even this is considered plaintiff should be put to its proof as to its inability to dispose of the entire production without invoking its right to tender to the Government.
>
> c. The contracts for Chalmette I and II provided that "production [for purposes of contract computation] shall commence upon the date of completion of the additional facilities." The date of completion was then defined as "the first day upon which 90 percent of the electrolytic cells, which are to be constructed as part of the additional facilities, are tapped." By staggering the completion of its lines at Chalmette I and II plaintiff enjoyed "free production" not charged against the Government's guarantee or required to be offered to nonintegrated users, in the amount of 112,906,000 pounds. The claimed weight of 86,035,297 should be set off against this excessive "free" pre-completion production. At the appropriate time defendant will move to amend its answer to assert this defense.

From the foregoing stipulation regarding damages, it follows that on the basis of entitlement to recovery on both the offgrade and alloy issues (alloys added in both the reduction pots and holding furnaces), plaintiff is entitled to recover the sum of $6,951,088.59, unless such sum should be reduced or eliminated in accordance with defendant's contentions (a) that plaintiff must prove that

it had the capacity to produce all or part of the 84,407,143 pounds claimed as remaining contract production, and could not have sold such additional production to others, (b) that such damages should be reduced by 79.526 percent, and (c) that the precompletion production of 112,906,000 pounds of aluminum at the additional facilities should be deducted from, thereby eliminating, the 84,407,143 pounds now claimed by plaintiff. These contentions are considered seriatim.

In 1958, plaintiff was the third largest producer of primary aluminum pig in the United States, with an installed capacity to produce a total of 89,500,000 pounds of primary aluminum pig per month. Its collective physical plant consisted of eight potlines at Mead, Washington, three potlines at Tacoma, Washington, nine potlines at Chalmette, Louisiana, and two potlines at Ravenswood, West Virginia, representing a total of 22 potlines. In terms of cost of operation, these plants ranked from the most costly to the least costly in the following order: Tacoma, Mead, Ravenswood, and Chalmette. From the standpoint of efficiency, they ranked from the least efficient to the most efficient in the following order: Tacoma, Mead, Chalmette, and Ravenswood.

When, on March 14, 1958, Kaiser was advised that defendant would accept only a part of the March 1958 tender, and that such acceptance marked the end of contract production, Kaiser premised its ensuing action on what it then foresaw as its legal duty to mitigate damages flowing from breach of contracts. It moved to reduce its production to accord with the decrease in demand, and the plant shutdowns that followed took into account the relative efficiency and operating costs of its various facilities. Kaiser's position as outlined in its March 24, 1958, reply to defendant, reads in pertinent part:

> * * * Since the loss of profit resulting from the shut down of non-contract facilities is smaller than the loss of profit resulting from the shut down of Contract No. GS-OOP-(D)-12006 facilities [Chalmette I supply

contract], the result of shutting down the non-contract facilities is to further mitigate the damages flowing from your action.

During the period from February 28, 1958 to June 1, 1958, Kaiser shut down a total of six potlines of which three were located at Tacoma, two at Mead, and one at Chalmette. In addition, two potlines at the Mead facility, originally shut down as a result of a power shortage, were maintained in standby condition, although power had been restored by January 27, 1958. Five of the potlines remained idle through October 18, 1958, with three being started somewhat before that date. The idleness of these potlines in the period from January 27, 1958, through October 18, 1958, was due to economic conditions, i.e., excess of supply over demand for aluminum. The total idle capacity of these eight potlines, when projected through the date of October 18, 1958, amounted to 140,703,000 pounds. October 18, 1958, is the date when contract production would have been completed under plaintiff's theory of computation.

Under the supply contracts it was defendant's obligation to guarantee the disposition of the contract production. Since the contracts expressly provided for the substitution of aluminum from non-contract facilities for aluminum actually produced at the contract facilities, Kaiser's decision to shut down non-contract facilities creates no legal issue.

During the period from March 1958 through October 1958, production at the idled facilities, if not curtailed, would have produced a surplus of at least 91 million pounds. This latter conclusion is based upon the following: In March 1958, Kaiser's inventory of primary metal was high at approximately 60 million pounds, sales had fallen to approximately 66 million, while total primary capacity (including Alcan contract purchases) stood at 96 million pounds. The imbalance of these factors—increasing inventory, decreasing demand, and high pro-

duction potential—resulted in the decision to shut down some of the reduction facilities. Thus, from March 1958 through October 1958, cutback in production was undertaken, while, at the same time, sales and other dispositions and lessening production resulted in a general decline in Kaiser's inventory level, which, for the period in question, fell from 60 million pounds in March to a low of approximately 11 million pounds in October 1958. Relating this factor (the 49 million inventory decline) to the idle plant capacity of 140,703,000 pounds, it becomes obvious, that had production not been curtailed, surplus production of 91 million pounds would have resulted. It is concluded that Kaiser had the plant capacity to produce the 84,407,143 pounds of remaining contract production, and that it could not have sold such excess production to others, and therefore would have put such amount to defendant as contract production.

The fact that during the period from March 18, 1958, to November 4, 1958, defendant purchased 125 million pounds of primary aluminum pig from plaintiff under the contracts does not defeat Kaiser's claim, even though such purchases contributed to the disposition of all of Kaiser's production during that period, even to the extent that Kaiser in October 1958 had only an inventory of 11 million pounds. Such purchases were merely transactions which in part established the facts stated concerning Kaiser's declining inventory, and support the finding that economic conditions required the shutdown of the eight potlines, since such "put" aequisitions were made after the Government stockpiling of aluminum had become excessive. Of course, such purchases undeniably contributed to the disposition of Kaiser's production during that period, but it cannot be concluded that they in any way affect the conclusion that Kaiser could have produced the additional 84,407,143 pounds which Kaiser could have put to defendant. It was defendant's refusal to purchase this additional quantity which necessitated curtailment of production under the existing economic conditions, and de-

fendant's breach of Kaiser's most favored nation right cannot reasonably be exonerated merely because Kaiser took reasonable steps to mitigate its damages and reduced production to the extent that there was no excess of production over dispositions of aluminum.

Equally strained is defendant's argument that the stipulated damages should be reduced by 79.526 percent merely because during the years 1954-1957, Kaiser sold only 20.474 percent of its total sales and other dispositions of its gross production to defendant. Defendant's obligation was to purchase not just a fixed percentage of either gross sales and dispositions or of contract production, but all contract production which Kaiser could not use itself or sell to others. Had economic conditions been such that defendant was required to make no purchases during the 1954-1957 period, defendant could not be sustained in an argument that it was therefore relieved of any obligation to purchase in 1958 even though economic conditions resulted in the circumstance that substantial amounts of contract production in 1958 could not be disposed of except by Government purchases.

With respect to the stipulated damages, defendant further argues that the 112,906,000 pounds of pre-completion production at the additional facilities should be applied to offset completely the 84,407,143 pounds which Kaiser could have produced and put to defendant but for defendant's refusal to permit Kaiser to compute contract production on the net basis. Defendant relies on Article VI of the contracts, which provides in pertinent part:

> (a) It is the intention of this Contract that the Government, by agreeing to purchase aluminum from the additional facilities as herein provided, guarantees the disposition of the entire output of the additional facilities to the extent of the Five Hundered Thousand (500,000) ton quantity specified in ARTICLE I, * * *.

and argues that since it was obligated to guarantee disposition of the entire output of the additional facilities, it is

entitled to count all of the production of such facilities and therefore to include the pre-completion production. However, Article IV of the contracts provides in pertinent part:

> The Government may require the sale to it of all or any part of the aluminum produced from the additional facilities from the date of the beginning of commercial production and prior to the date of completion of the facilities. * * * Any quantity of aluminum produced during this period shall not reduce the quantities otherwise specified in this contract, and specifically shall not be included as a portion of the Five Hundred Thousand (500,000) tons specified in ARTICLE I, * * *.

and Article I clearly defines "completion of construction" as follows:

> * * * The date of completion of construction of the additional facilities shall be the first day upon which ninety per cent (90%) of the electrolytic cells, which are to be constructed as a part of the additional facilities, are tapped. * * *

The pre-completion production involved here (112,906,000 pounds) occurred prior to the tapping of 90 percent of the electrolytic cells of the additional facilities under the Chalmette I and II contracts, and the evidence does not establish that Kaiser unreasonably delayed, but rather is it clear that it reasonably expedited its construction of the contract facilities. The parties obviously expected "pre-completion production" and expressly excluded the same from contract production in defining the extent of defendant's guarantee. The reason is obvious. Defendant wanted to accomplish the earliest possible production in the additional facilities to meet the great need of the nation for aluminum. Kaiser reasonably took advantage of contract provisions and produced aluminum, expressly not to be counted in contract production, by starting up a new potline as soon as it was ready, but before the date of completion of the additional facilities, as defined in the contract. This reasonable exercise of its contract

right cannot now be held to defeat Kaiser's claim for damages.

In 1956, Kaiser commenced construction of aluminum reduction facilities, not involved in any contracts with defendant. A ninth potline was added at the Chalmette plant, which began operation on November 4, 1957, and two potlines were installed at the Ravenswood plant, which were started on November 17, 1957, and January 20, 1958, respectively. When Kaiser commenced construction of these facilities in 1956, there was a sellers' market in aluminum, whereas by 1958, there was an oversupply. Of course, these new facilities contributed to the surplus of Kaiser plant facilities, which required shutdown of eight lines during 1958. Article VI of the contracts, after stating the Government's guarantee of disposition of the entire output of the additional facilities, continues as follows:

> * * * In this connection, it is recognized that Contractor now has other aluminum reduction facilities and may in the future acquire further aluminum reduction facilities other than those to be constructed under this Contract. It is understood that, except as to orders from the Government expressly placed pursuant to this Contract for aluminum to be produced at the additional facilities to be constructed under this contract, Contractor may first dispose of the production from such other facilities or utilize for its own purposes the production of such other facilities, before disposing of or utilizing aluminum from the additional facilities, and that, in accordance with ARTICLE III(c), the Government will purchase from Contractor all of the production of the additional facilities not otherwise disposed of or utilized by Contractor. The Government does not, by this contract, guarantee or agree to purchase production from other facilities.

Thus, it is apparent that the parties clearly understood that Kaiser retained the right to acquire further reduction facilities, and there is no basis in law or in fact to reduce or eliminate the stipulated damages on account of Kaiser's exercise of that right.

Regarding Kaiser's claimed damages for shutdown, standby and startup costs incurred on three of the eight potlines idled by economic conditions in 1958, the parties stipulated as follows:

> 5. If the court finds, as a matter of law, that plaintiff is entitled to damages on its claim for shutdown, standby, and startup, the court shall enter judgment in the amount of $247,566.96.

Potlines 3 and 5 at Mead were shut down on April 5, 1958, and potline 3 at Chalmette on June 1, 1958. All three remained closed until August 8, 1958, when they were started again. The idle production capacity of these lines amounted to 41,133,000 pounds during their shutdown period. Had defendant purchased the 84,407,143 more pounds of aluminum, these three lines would have been operated continuously throughout the year 1958, in order to produce, in part, the additional 84,407,143 pounds, and Kaiser would not have incurred the shutdown, standby, and startup costs in the stipulated amount of $247,566.96. The evidence does not establish, as contended by defendant, that potline 3 at Chalmette was shut down for the purpose of conducting experimentation with a lithium bath instead of cryolite customarily used in the reduction cells, although it is true that when that line was restarted, such experimentation was conducted therein for a short period of time. The shutdown and idleness of this potline were clearly due to economic conditions and the efforts of Kaiser to mitigate its damages.

It is concluded that plaintiff is entitled to recover on its petition, and that judgment should be entered for plaintiff in the sum of $6,951,088.59 on the offgrade and alloy issues, and $247,566.96 for shutdown, standby, and startup costs, or a total of $7,198,655.55, and defendant's counterclaims and plaintiff's request for affirmative relief in its reply to such counterclaims should be dismissed.

COLLINS, *Judge*, took no part in the decision of this case.

IN THE
UNITED STATES COURT OF CLAIMS

No. 49-63

(Decided April 11, 1969)

KAISER ALUMINUM & CHEMICAL CORPORATION

v.

THE UNITED STATES

Max Thelen, Jr., attorney of record, for plaintiff. *Robert Gordon Sproul, Jr.*, and *Thelen, Marrin, Johnson & Bridges*, of counsel.

Frances L. Nunn, with whom was *Assistant Attorney General William D. Ruckelshaus*, for the defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

On Defendant's Motions Under Rule 69(B) (1) and (2) for Relief From Judgment and for Stay of Proceedings

NICHOLS, Judge, delivered the opinion of the court:

This case is before us on defendant's motion under Rule 69(b) (1) and (2) for relief from our judgment in *Kaiser Aluminum & Chem. Corp.* v. *United States*, 181 Ct. Cl. 902, 388 F. 2d 317 (1967), and defendant's motion for a stay of proceedings on the Rule 69(b) motion until a decision has been rendered in another case pending before us. Plaintiff, Kaiser Aluminum & Chemical Corp. (hereinafter Kaiser), opposes both motions. A brief review of this

earlier *Kaiser* case (hereinafter *Kaiser I*) is necessary for an understanding of the present controversy.

As part of the aluminum expansion program during the Korean War, the General Services Administration (hereinafter GSA) executed contracts on behalf of the defendant with three major aluminum suppliers: Kaiser, the Reynolds Metals Company (hereinafter Reynolds), and the Aluminum Company of America (hereinafter Alcoa). The contracts with each of the companies required expansion of their aluminum production facilities in return for defendant's market guarantee agreements. Under its contracts, Kaiser was to construct additional facilities, privately financed, and operate them. In return defendant guaranteed to purchase the production of the additional facilities required by the contracts to the extent that Kaiser was unable to sell this production or use it for its own purposes. Kaiser's contracts obligated it to produce 2 billion 282 million pounds of primary aluminum pig. The ultimate issue in *Kaiser I* was whether or not that amount of production had been achieved. If it had, the Government was relieved of its guarantee liability. If not, Kaiser could produce the remainder and "put" it to the Government, as defined below. The dispute centered around the accounting method used in measuring production under these contracts prior to April 1, 1957. The method of measuring production after that date was not in dispute, having been settled by amendments to the contracts and specifically it was decided by such amendments what treatment should be accorded offgrade aluminum (an unintended product of an aluminum reduction line, most often in the startup phase of operations, which, according to accepted commercial practices when the contracts were negotiated, was defined as aluminum pig having a purity of less than 99%) and alloys (a product which results from the deliberate addition of other metals in the reduction pots). We held, however, that the amend-

ments left open the measurement of production before April 1, 1957.

Kaiser claimed two grounds for recovery in that suit: first, that defendant had breached its original contracts with Kaiser and second, that defendant had breached its later so-called "most favored nation" agreement with Kaiser. Article I of the contracts provided (the contracts were identical in their relevant terms and the following provision is taken from the contract to construct facilities at Chalmette, Louisiana referred to in *Kaiser I* as Chalmette I):

> Subject to the terms and conditions hereof, Contractor agrees to produce and to sell Five Hundred Thousand (500,000) short tons of 2,000 pounds each, of primary aluminum pig, said primary aluminum to be of minimum grade of ninety-nine percent (99%) aluminum, which primary aluminum is herein called the "additional production." The Contractor will produce such aluminum from facilities which the Contractor agrees hereafter to construct, herein called the "additional facilities." * * *

Kaiser interpreted this provision to mean that only metal which had a minimum purity of 99% aluminum or higher would be included in computing "additional production" (thus excluding offgrade) and also that the weight of minimum purity metal should be determined without reference to any other metal added to make alloys. (In *Kaiser I* we referred to this basis of measuring contract production as the "net basis".) The parties had stipulated that the weight of all offgrade and alloy additions before April 1, 1957 was 84,407,143 pounds, thus, if plaintiff's interpretation of the contract were correct, then Kaiser would have been able to "put" (a forced sale of aluminum to the Government due to a contractor's inability to dispose of the offered aluminum through the usual channels. *See* Finding 15, *Kaiser, supra,* at 944.) An additional 84,407,143 pounds to the Government, as

the amount of contract production would have been reduced by that amount.

Defendant argued that the weight of all aluminum produced at the additional facilities prior to April 1, 1957, regardless of purity and including alloys, should be used to measure the amount of "additional production." (This basis of measurement was referred to as the "gross basis" in *Kaiser I*.) If this interpretation were correct, then Kaiser would have had no claim for recovery.

Kaiser also relied on a most favored nation theory to support its claim. In negotiating the contracts the defendant had agreed that each of the aluminum companies would receive uniform treatment. Letters from defendant to each of the suppliers confirmed this policy. The agreement allowed Kaiser to compel amendment of its contract terms to conform with the terms of its competitors' contracts. Kaiser had never requested amendment of its contract pursuant to the agreement, but it did contend that its contract should be accorded the same interpretation as those of its competitors. Kaiser argued that Reynolds had been allowed to exclude alloys and offgrade and therefore, under the terms of the agreement, it should be allowed to compute its production for contract purposes in the same way. Kaiser regarded defendant's refusal to permit it to compute its contract production on a net basis as a breach of the most favored nation agreement. Defendant for reasons needless to go into, in view of other conclusions we reach, decided not to contest Kaiser's assertions about Reynolds' accounting methods. Reynolds was not a party and its officials were not called as witnesses. The court took what was said about Reynolds as true, and so found. (Finding 42.) We decided that Kaiser's most favored nation agreement gave it a right to compel a uniform interpretation of its contract and that since Reynolds (as we supposed) had been allowed to exclude alloys and offgrade in computing its contract production Kaiser was

entitled to do the same. On December 15, 1967, we entered judgment for Kaiser in the amount of $7,198,655.55.

After our *Kaiser I* decision, Reynolds filed a claim for damages of $7,643,436 with the GSA. Reynolds claimed that it had not excluded all of its offgrade metal in computing contract production, but only some of it, and therefore under its most favored nation agreement with the defendant, it was entitled to the same interpretation of its contract that Kaiser received in *Kaiser I, i.e.*, it claimed the right to exclude all offgrade in computing contract production. GSA denied the claim and defendant then brought a suit in the United States District Court for the District of Columbia for a declaratory judgment stating that the United States was not liable to Reynolds notwithstanding our *Kaiser I* decision. While defendant's declaratory judgment suit was pending, Reynolds filed suit in this court, and defendant then dismissed its suit in the district court. Defendant then filed a motion for relief from the *Kaiser I* judgment and a motion to stay the proceedings on that motion until the pending Reynolds' suit was disposed of. Defendant maintains that our *Kaiser I* decision, as far as it relied on Reynolds' exclusion of offgrade, is erroneous, but until Reynolds' case is decided, the error cannot be determined. Kaiser opposes both motions. The treatment of alloys is not at issue in the present suit—only the treatment of offgrade. For reasons to be discussed *infra*, neither of defendant's motions can be granted.

Defendant argues that *Kaiser I* was decided on the most favored nation theory and our finding that Reynolds excluded offgrade was the basis for our decision in Kaiser's favor; therefore if Reynolds did not exclude offgrade in computing its contract production, *Kaiser I* is erroneous. Plaintiff, on the other hand, argues that its right to recovery in *Kaiser I* was based on both its interpretation of the basic contract and its most favored nation theory and that even if Reynolds did not exclude offgrade in measur-

ing contract production, so that the most favored nation theory is not determinative as to offgrade, our decision must stand on the original contract ground. Neither party is entirely correct.

Our decision in *Kaiser I* was indeed based on the most favored nation theory, *see* Finding 60, *Kaiser, supra,* at 968, but in deciding the case on that ground, we did not reject Kaiser's contract theory as a basis for its recovery. We did discuss the contract issue at length, but as the case was presented to us, the most favored nation ground seemed to provide a clear and sufficient basis for Kaiser's recovery on both the alloy and offgrade issues, and resolution of the contract ambiguities was made unnecessary thereby. But defendant now wishes to challenge our reliance on Reynolds' treatment of offgrade as a basis for Kaiser's recovery and it does appear there is at least uncertainty as to how Reynolds dealt with its offgrade in computing "additional production." In making this statement we are not prejudging Reynolds' case which is pending before us, and any proof of how Reyolds treated its offgrade will have to await further proceedings in that case.

We did not need to know how Reynolds dealt with its offgrade in order to decide the offgrade issue in *Kaiser I* in Kaiser's favor. Our decision could have rested on an interpretation of the original contract. Article I of the contract appears on its face to be quite clear. The construction difficulties arose because each of the aluminum companies computed its contract production differently and negotiations between the GSA and the aluminum companies were conducted for several years after execution of the contracts for the purpose of defining the term "additional production." The development of a uniform accounting system for measuring contract production by the suppliers was a major topic of discussion at the negotiations and the problem centered around whether or not alloys should be included in measuring "additional production." *Kaiser, supra,* at 921. Kaiser

always regarded reporting production as a subject distinct from computing production under the contract, as is apparent from its proposals put forth during its negotiations. It always reported its production on a gross basis, but the method of computing production for contract purposes was left to negotiation. Kaiser is entitled to have its contract interpreted as it reads without suffering from the inconsistent actions of other contractors under other contracts, even if their language is the same.

Our interpretation of Kaiser's rights under Article I depends in large part on its actions. We held in *Kaiser I*, at p. 921, that:

> * * * At no point during the years in which the questions of defining the term "additional production" was under discussion, did Kaiser ever advance the proposition that computed production (as distinguished from reported production) should also include offgrade metal. * * *

Thus, Kaiser never desired to have offgrade included in its computations of additional production.

In *Kaiser I* we concluded that Article I of the contract was ambiguous but that there appeared (p. 922):

> * * * to be no basis for resting Kaiser's clear right to exclude from "contract" production the weight of offgrade metal that was included in its production reports, since this was never embraced within the scope of the Article I ambiguity. The contracts called for the production of primary aluminum pig and ingot having a minimum purity of 99 percent. * * *

We reached these conclusions about how offgrade should be treated under Article I *not* because we thought Reynolds interpreted its contract so as to exclude offgrade but because of the plain meaning of the language, with which Kaiser's actions were always consistent. According to commercial standards applicable during the contract period aluminum of less than 99 percent purity was considered offgrade. *See*

Finding 9, *Kaiser, supra,* at 941-42 and Finding 17, *id.* at 946-47. Therefore, by definition, offgrade would be excluded from computation under the contract as Article I called for production of "primary aluminum to be of minimum grade of ninety-nine percent (99%) aluminum."

The question which we thought to be still unanswered by Article I and the evidence before us was what treatment should be accorded alloys. We navigated what we thought was the least obstructed channel and resolved the ambiguous alloy issue and the offgrade issue which as to Kaiser was without ambiguity, both together under the most favored nation theory.

Defendant's motions now raise some uncertainty about Reynolds' treatment of offgrade and we can no longer view the offgrade issue as clearly settled under the most favored nation theory; however, we find the solution to the offgrade issue in the contract terms as we have construed and still construe them. What we said regarding Article I of the contracts and its lack of ambiguity on the offgrade issue is still valid and defendant has presented nothing in its motion to the contrary. Rule 69(b)(2) is not intended for the reopening of cases that have been correctly decided under the applicable facts and law.

If our suppositions about Reynolds were wrong, we think the error came about notwithstanding good faith on the part of all concerned in this lengthy and complex litigation.

We now hold that Kaiser is and was entitled to recover on the offgrade issue because of defendant's breach of contract in not allowing Kaiser to exclude offgrade in measuring its "additional production" under Article I of the contract. Defendant's motions are denied and the judgment that Kaiser has recovered in this case will stand.

Following oral argument, defendant was allowed to file an affidavit which plaintiff has moved to strike. That motion is allowed because, in the view we take of the case, the content

of the affidavit is irrelevant. It offers an explanation why defendant did not put in issue the accounting treatment of Reynolds' production: the result we reach is unaffected by this. Plaintiff has made another motion in case the motion above mentioned is overruled, but action on that motion is not required, the contingency on which it was made not having arisen.

LARAMORE, *Judge*, DURFEE, *Judge*, DAVIS, *Judge*, and SKELTON, *Judge*, concur in the foregoing opinion.

COWEN, *Chief Judge*, concurring in the result:

I concur in the result reached by the court, but I would deny the defendant's motions on the ground that it has failed to make the showing that would justify granting relief under our Rule 69(b).

Rule 69(b), which for all practical purposes is identical to Federal Rule of Civil Procedure 60(b), provides in pertinent part as follows:

> [T]he court may relieve a party * * * from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 68(c); * * *

Relief under this rule is discretionary with the court. Since the rule provides for extraordinary relief, the courts have uniformly held that it may be invoked only upon a showing of exceptional circumstances. *Flett* v. *Alexander*, 302 F. 2d 321 (7th Cir. 1962), *cert. denied*, 371 U.S. 841 (1962), and cases cited therein.

Defendant claims that the court erred in holding that Kaiser was entitled to recover under its "most favored nations" agreement with the Government, because, defendant says, the court made a factual mistake in finding that Reynolds Metals Company was permitted to exclude off-

grade metal from its computations of contract production, whereas Kaiser included such metal in its contract production computations. But the defendant has not made a clear showing that such a mistake occurred. All defendant presently knows is that Reynolds Metals Company has filed a suit in this court claiming that it did not exclude offgrade metal, except for 30,839,082 pounds produced at its San Patricio Plant. Defendant asserts that the offgrade material excluded by Reynolds was "starter" material and that this practice was followed by Kaiser and the other companies.

There is nothing new or exceptional in the Government's contentions regarding Reynolds' practices and the Government has clearly failed to establish that the court erred in its factual determinations in this case. Among the papers submitted with defendant's motions is a copy of a letter dated July 11, 1968, from Reynolds Metals Company to the General Services Administration, containing a quotation from a letter written on May 9, 1958, by the Administrator of the General Services Administration to the Comptroller General, when the latter was considering Kaiser's claim. The letter quoted from is included in the record of this case as Defendant's Exhibit 201 for Identification. It shows that five years before Kaiser filed suit, GAS had determined that Reynolds had not excluded *all* offgrade metal from its contract production computations; that Reynolds was disputing Kaiser's claim that Reynolds had been given favored treatment by being allowed to exclude the subpurity metal, and that Reynolds had informed the Government that if Kaiser were permitted to recompute its production by excluding the offgrade metal, Reynolds would insist upon the same treatment. Although Defendant's Exhibit 201 was not admitted in evidence, a statement substantially to the same effect was contained in Plaintiff's Exhibit 53, a letter from the Comptroller General dated June 6, 1958. Plaintiff's Exhibit 53 was not only considered at the trial but was included in defendant's proposed finding of fact to the trial commissioner

(defendant's requested finding 36, page 40, Defendant's Proposed Findings of Fact, filed November 5, 1965). In view of these circumstances and the extensive transcript and supporting documents, I do not think we should grant the defendant's motion on the ground of mistake, since the Government has not substantiated by adequate proof what factual errors were made, *Thomas* v. *Colorado Trust Deed Funds, Inc.*, 366 F. 2d 136 (10th Cir. 1966).

As I read the defendant's motions, the Government's principal basis for obtaining the relief sought under Rule 69(b) is "excusable neglect." The defendant says that in view of the action filed by Reynolds and the contentions made by it, it is now essential to make an accurate determination regarding Reynolds' treatment of offgrade metal and that Reynolds' records, which provide the best evidence on this point, were never before the court. The affidavit of defendant's attorney states that when she was assigned to the case, she was informed by the General Services Administration that Mr. William G. Magee, one of the Government's principal witnesses in the case, was the most knowledgeable person in the GSA on the subject of the aluminum supply contracts in issue. Her affidavit further states that Mr. Magee had advised her that Kaiser was correct in its contention that Reynolds was computing production by excluding the offgrade metal.[1] She also avers that, in view of the pressure under which trial preparation was required to proceed, she did not have the time to obtain accurate information about Reynolds' accounting practices and believed that the correct answer had already been supplied by Mr. Magee. A review of Mr. Magee's indefinite testimony indicates that he did not make a thorough study of the data that was available to the Government regarding Reynolds' treatment of offgrade metal production during the years in

[1] The affidavit does not state and there is nothing in the record to show that Mr. Magee ever stated or reported that Reynolds had excluded *all* such offgrade metal.

question and that without such a study, he was unable to recall many of the important facts relating to this matter. Under these circumstances, the question before us is whether we should now allow the Government to retry the case and introduce evidence which the Government says *may* show factual infirmities in the court's findings, when the defendant made no effort to obtain such evidence for presentation at the trial. It seems to me that this question should be answered in the negative.

The record is entirely clear that the Government should have been on notice that Reynolds' accounting practices, with respect to its treatment of offgrade metal in its contract production, were essential to the defense of Kaiser's suit in this court. The initial pleading filed in 1963 contains the allegation that Kaiser believed that Reynolds had excluded the offgrade aluminum. I have already referred to Defendant's Exhibit 201 and to Plaintiff's Exhibit 53, a document of similar import. It is quite apparent from the lengthy letter of May 9, 1958 (Defendant's Exhibit 201), that GSA then well knew the nature of Kaiser's claims and rejected them; that it then realized that if it did not reject them, Reynolds would dispute the factual basis of the Kaiser claim and would insist on entitlement to any allowances made to Kaiser on that account. As previously stated, this letter was available to defendant five years before this suit was filed, and it should have alerted the Government to the factual disputes that would arise when Kaiser undertook to prove that Reynolds had been given preferential treatment. Yet so far as appears, nothing was done to obtain from Reynolds evidence of the factual basis upon which Reynolds disputed Kaiser's claim of preferential treatment.

There is also in the record a document, Plaintiff's Exhibit 179, which is a summary of Reynolds' contract production at San Patricio. The summary was prepared by Mr. Magee and shows that during the start-up production at San

Patricio, 32,249,977 pounds of offgrade metal were produced and not included as a part of contract production. It is apparent that this document was in the hands of the Government long before Kaiser saw it, and since it put the Government on notice that Reynolds had excluded some offgrade production, it seems to me that the information should have alerted the Government to the desirability and necessity of finding out how much offgrade metal Reynolds excluded from its contract production and how much, if any, it included in that production. But, again, it appears that the Government did not feel it necessary to obtain the complete facts on this element of its defense.

Since defendant's attorney says that she relied on Mr. Magee's advice, attention is directed to his deposition which was taken for discovery purposes on January 29, 1964. Since Mr. Magee testified at the trial, the deposition was not admitted in evidence. The deposition is pertinent, however, in determining whether the defendant's reliance on Mr. Magee's indefinite statements and uncertain recollection constituted "excusable neglect," which justified the Government's failure to comb its own records or those of Reynolds Metals Company for an accurate determination of Reynolds' treatment of offgrade metal. Mr. Magee could not recall the details of his own work and could not remember what Reynolds had or had not done with respect to some or all of its offgrade production. Thus:

> Q [by plaintiff's counsel] And the information you had at that time was, in reporting production, Reynolds had excluded some metal which you described as starter metal.
> A [by Mr. Magee] Well, you've had access to the report. I haven't seen it for a long time. You apparently have reviewed it very recently, since you're aware of it. I wouldn't want to say when it was taken out, how much it was or to what extent.

* * * * *

Q All right. Do you know for how long a period this production of so-called starter metal continued at Reynolds?
A No, sir, I do not.
Q Do you know what period of time was covered by this exclusion of starter metal?
A No, sir, I do not.
Q Now—
A Not from memory, I must say, but it may be in the records.

Since this deposition was taken almost a year before the trial began, it is very difficult to understand why the Government was surprised at the trial by the fact that Mr. Magee's testimony was not of overwhelming value to the defense. More to the point, however, I think the deposition dispels the notion that the Government could justifiably rely on Mr. Magee's recollection and advice, to the extent of excluding any thought of ascertaining the complete facts about Reynolds' practices from documentary records. If the information needed was not already in the possession of the Government in the form of auditing reports routinely made in the course of administering the contracts, Reynolds' files and the person in charge of keeping its records could have been subpoenaed under the rules of the court.

I realize that this is an extremely complicated case and that defendant's attorney may not have had all of the time that she desired. Nevertheless, the case was filed in 1963, did not go to trial until December 1964, and final judgment was not entered until December 15, 1967. Under the circumstances recited above and in the light of the authorities which have considered similar applications for relief, it seems to me that the defendant's omission to obtain and present the evidence, which it says the court should have had before it, is not "excusable neglect." *Farmers Cooperative Elevator Ass'n* v. *Strand*, 382 F. 2d 224 (8th Cir. 1967), *cert. denied*, 389 U.S. 1014 (1967); *Greenspahn* v. *Jos. E. Seagram & Sons*, 186 F. 2d 616 (2d Cir. 1951); *Plisco* v.

Union R.R. Co., 379 F. 2d 15 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1014 (1967); *Kahle* v. *Amtorg Trading Corp.*, 13 F.R.D. 107 (D. N.J. 1952).

I do not understand that the defendant is claiming relief from the judgment on the ground of newly discovered evidence. In any event, it is apparent that it is not now offering to produce evidence which was not available at the time of the trial or which could not have been discovered by the exercise of reasonable diligence prior to the trial.

Any court is necessarily concerned when a responsible attorney alleges that it has reached an incorrect result because of a mistaken determination of the facts of a case. However, the facts in any litigation must be decided on the basis of the evidence produced by the litigants in that particular case. It may well be that if the case were retried, the Government could present a stronger and more effective defense, but to make a litigation an open-end proposition jeopardizes the confidence which litigants can place in a court's ability to render a final judgment. To be sure, there are exceptional circumstances under which judgments should be set aside when an adequate showing is made under Rule 69(b). In the absence of such a showing, the time comes when a court must stick by the judgment it rendered so that the parties are finally put at rest about their respective rights and obligations as the court determined them.

It is rare indeed to find an attorney on the losing side of any vigorously contested case, who cannot make an appealing argument that if he had had more time, if he had not overlooked certain matters, or if he had had more assistance from his client, he would have won the case. But these are not the grounds upon which courts grant relief from a judgment under a rule like our Rule 69(b). When all is said and done, it seems to me that the Government here is asking for a retrial, because its attorney did not have the time and help needed for an adequate presentation of

its defense. I do not question the good faith or the sincerity of the Government's conscientious attorney. She was the second attorney assigned to represent the Government in this case, and I do not doubt that she exerted every effort, under difficult conditions, to do what she thought best for her client. I sympathize with her because the record indicates that she had to carry the entire burden of preparing for and trying a lengthy and complicated case without the help of any other attorney. If the Government's defense was deficient on that account, the responsibility lies with those who are charged with the protection of the Government's interests in litigation. This is a burden which the court cannot and should not assume. In the interest of judicial economy, in fairness to the parties, and in fairness to other litigants waiting to have their cases decided, we should not allow the parties to try and retry cases, especially cases like this which have already consumed so much time, expense, and effort, unless it is demonstrated that exceptional circumstances, contemplated by our Rule 69(b), justify such action.

LARAMORE, *Judge* DURFEE, *Judge*, and COLLINS, *Judge*, concur in the foregoing concurring opinion of the *Chief Judge*.

LARAMORE, *Judge*, concurring in the result:

I agree with Judge Nichols' opinion. I also agree with the concurring opinion of the Chief Judge concurring in the result, but would add this—that this court was correct in its original opinion based on the facts then before us, and defendant, by its motion, has not presented any new fact.

DURFEE, *Judge*, concurs in the foregoing concurring opinion of Judge Laramore.

DURFEE, *Judge*, concurring:

I concur with the majority opinion of the court that plaintiff is entitled to recover on the off-grade issue under the

contract, as construed by the court under the applicable facts and the law.

I also concur with the concurring opinion by the Chief Judge on the ground that defendant's motion for relief from the judgment under Rule 69(b) should be denied because of the failure of defendant to demonstrate that there are exceptional circumstances contemplated and required by the Rule, which would justify granting the motion.

I also concur with the additional factor pointed out by Judge Laramore that the court was correct in its original opinion and defendant, by its motion, has not presented any new fact.